Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

DAVID PAUL HAMMER,

Petitioner,

v.

JOHN D. ASHCROFT, HARLEY G. LAPPIN, KATHLEEN HAWK-SAWYER, and KEITH OLSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 28 C.F.R. § 540.63, federal prisoners may be interviewed face-to-face by the press, unless the warden determines after an individualized inquiry that the interview would endanger the interviewer or "probably cause serious unrest or disturb the good order of the institution." However, after the broadcast of an interview with Timothy McVeigh, Attorney General John Ashcroft banned all face-to-face press interviews with male federal death row inmates. The Attorney General cited no security reasons, but stated that such prisoners should be denied "a podium" to communicate their ideas. Two questions are presented:

1. Whether the *en banc* Seventh Circuit erred in upholding this abridgement of First Amendment rights, when it held, contrary to decisions of the Second, Third, Eighth, and Ninth Circuits, that the "legitimate penological interest" required by *Turner v. Safley*, 482 U.S. 78 (1987), may be established as a matter of law through *post-hoc* litigation declarations referring to "security concerns," or, alternatively, by a court's ability to imagine or hypothesize such concerns, even where the stated reason for the abridgement was unconstitutional.

2. Whether the *en banc* Seventh Circuit erred by ignoring the four factor test set forth in *Turner* and by adopting a test of its own, under which it held that a permanent ban on face-to-face press interviews with male-death-row inmates, a sub-class of federal prisoners, does not violate the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner David Paul Hammer was the plaintiff-appellant below. Respondents John D. Ashcroft, Harley G. Lappin, Kathleen Hawk-Sawyer, and Keith Olson were defendants-appellees below.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. INTRODUCTION 2

B. STATEMENT OF FACTS 4

C. PROCEDURAL HISTORY 8

REASONS FOR GRANTING THE WRIT 11

I. The Decision Below Conflicts With Prior Decisions Of This Court, And With Decisions Of Other Federal Courts Of Appeals, By Holding That *Turner*'s "Legitimate Penological Interest" Requirement May Be Satisfied By *Post-Hoc*, Litigation Declarations Or By Purely Hypothetical Explanations, Even Where Contemporaneous Statements Show That The Restriction Was Adopted For Patently Unconstitutional Reasons. 13

II. The Decision Below Departs From This Court's Prior Holdings By Disregarding *Turner* And Upholding The Constitutionality Of A Permanent Restriction On The First Amendment Rights Of A Sub-Class Of Prisoners..... 23

CONCLUSION 29

Appendix A

Hammer v. Ashcroft, 570 F.3d 798 (7th Cir. 2009) (en banc) 1a

Appendix B

Hammer v. Ashcroft, 512 F.3d 961 (7th Cir. 2008) 31a

Appendix C

Hammer v. Ashcroft, No. IP 01-558-C-T/G, 2006 WL 456177 (S.D. Ind. Feb. 23, 2006) 49a

Appendix D

Hammer v. Ashcroft, 42 F. App'x 861 (7th Cir. 2001) 63a

Appendix E

Hammer v. Ashcroft, No. IP 01-558-C-T/G (S.D. Ind. May 24, 2001) 71a

Appendix F

Constitutional Provisions and Regulations Involved 80a

Appendix G

Ashcroft Press Conference 85a

Appendix H

Institution Supplement THA-1480.05A 103a

TABLE OF AUTHORITIES

CASES

Abu-Jamal v. Price, 154 F.3d 128 (3d Cir. 1998) 12, 19

Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) 15

Beard v. Banks, 548 U.S. 521 (2006) .. 13, 23, 27, 28

Bell v. Wolfish, 441 U.S. 520 (1979) 27

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 17

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 17

Johnson v. California, 543 U.S. 499 (2005) 15

Motor Vehicle Manufactures Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 17

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 13, 23, 27

Overton v. Bazzetta, 539 U.S. 126 (2003) 13, 16, 23, 27, 28

Pell v. Procunier, 417 U.S. 817 (1974) 15, 23, 24, 27

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 26

Quinn v. Nix, 983 F.2d 115 (8th Cir. 1993) 12, 20

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 26

Salahuddin v. Goord, 467 F.3d 263 (2d Cir. 2006) 12, 18, 19

Saxbe v. Washington Post Co., 417 U.S. 843 (1974) 23, 24

SEC v. Chenery Corp., 318 U.S. 80 (1943) 17

SEC v. Chenery Corp., 332 U.S. 194 (1947) 17

Thornburgh v. Abbott, 490 U.S. 401 (1989) ... 23, 27

Turner v. Safley, 482 U.S. 78 (1987) ..... *passim*

United States v. Hammer, 404 F. Supp. 2d 676 (M.D. Pa. 2005), *appeals dismissed*, 564 F.3d 628 (3d Cir. 2009) 4

Walker v. Sumner, 917 F.2d 382 (9th Cir. 1990) 12, 20

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 22

Whitney v. California, 274 U.S. 357 (1927), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969) 14

Widmar v. Vincent, 454 U.S. 263 (1981) 26

Williams v. Rhodes, 393 U.S. 23 (1968) 26

Wolff v. McDonnell, 418 U.S. 539 (1974) 14

STATUTES

28 U.S.C. § 1254 2

28 U.S.C. § 540.63 ..... 2, 5, 7, 8, 27, 28

28 U.S.C. § 540.63(g)(4) 27

OTHER AUTHORITIES

Fed. R. Civ. P. 56(f) 8

Mary Bosworth, *The U.S. Federal Prison System* (2004) 15

PETITION FOR A WRIT OF CERTIORARI

David Paul Hammer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit, by a vote of 5-to-3, reversed the unanimous panel decision in this case. The majority and dissenting opinions of the *en banc* court are reported at 570 F.3d 798 (7th Cir. 2009) and reprinted at App. 1a-30a. The panel opinion is reported at 512 F.3d 961 (7th Cir. 2008) and reprinted at App. 31a-48a. The memorandum opinion and order of the United States District Court for the Southern District of Indiana, which granted summary judgment in favor of respondents and dismissed petitioner's *pro se* amended complaint, is not reported, but is reprinted at App. 49a-62a. An earlier Seventh Circuit opinion, reversing the district court's dismissal of petitioner's original *pro se* complaint for failure to state a claim, is reported at 42 F. App'x 861 (7th Cir. 2002) and reprinted at App. 63a-70a. The district court's memorandum opinion and order dismissing the original complaint is not reported, but is reprinted at App. 71a-79a.

STATEMENT OF JURISDICTION

The Seventh Circuit entered judgment on June 25, 2009. (App. 1a). On September 15, 2009, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including October 23,

2009. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution and the pertinent provisions of Section 540.63 of Title 28, Code of Federal Regulations, and Institution Supplement THA-1480.05A are reprinted at App. 80a-84a, 103a-111a.

STATEMENT OF THE CASE

A. Introduction

To strike a proper balance between First Amendment rights and prison security, the Federal Bureau of Prisons ("BOP"), after notice-and-comment rulemaking, promulgated 28 C.F.R. § 540.63, which allows federal inmates to participate in face-to-face press interviews, unless the warden determines, after a individualized inquiry, that the interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution." (App. 82a). Absent such a finding, the interview must proceed.

Following a nationally-televised interview with Timothy McVeigh, however, Attorney General John D. Ashcroft banned face-to-face interviews with all male federal death row inmates. (App. 90a). The Attorney General did not rely on any security concern or other "legitimate penological purpose," but on his personal view that such prisoners should

be prevented from communicating their ideas to the public. (App. 90a). He ordered the ban "to restrict a mass murderer's access to the public podium" and to prevent the "irresponsible glamorization of a culture of violence." (App. 90a). Warden Harley G. Lappin, who was then the warden at the United States Penitentiary at Terre Haute, Indiana ("USP-TH") (which houses all male federal death row inmates), subsequently memorialized the ban in Institution Supplement THA-1480.05A. (App. 103a-111a).

Petitioner David Paul Hammer, a male federal death row inmate, brought this *pro se* action to challenge the constitutionality of the ban. The district court dismissed his complaint for failure to state a claim (App. 79a), but the Seventh Circuit reversed and remanded, with instructions that the case proceed to discovery. (App. 70a). On remand, respondents refused to answer any of Mr. Hammer's *pro se* discovery requests. (7th Cir. JA at 76-86). The district court nonetheless granted respondents' motion for summary judgment and again dismissed Mr. Hammer's *pro se* claims. (App. 62a). On appeal, a panel of the Seventh Circuit unanimously reversed the district court's dismissal order, and once again remanded for discovery and trial. (App. 48a).

The Seventh Circuit granted respondents' petition for rehearing *en banc*. By a 5-to-3 vote, the *en banc* court reversed the panel decision, holding that respondents were entitled to summary judgment because Mr. Hammer was not entitled to discovery and had not presented a triable issue. (App. 15a). According to the Seventh Circuit

majority, and contrary to the decisions of every other circuit to have considered the question, respondents' actual reasons for adopting the total ban were not relevant to the inquiry mandated by *Turner v. Safley*, 482 U.S. 78 (1987). According to the majority, *Turner*'s "legitimate penological interest" requirement may be satisfied, as a matter of law, by the submission of conclusory, *post-hoc* declarations as to the existence of "security concerns." (App. 10a-11a). Indeed, the majority held that *Turner* would be satisfied even without such declarations, if a court could simply imagine or hypothesize a "legitimate penological interest" for violating First Amendment rights. (App. 5a). Thus, summary judgment was appropriate, according to the majority below, even though Attorney General Ashcroft had cited only constitutionally impermissible reasons to justify the ban at the time he announced it.

B. Statement of Facts

Mr. Hammer, who was sentenced to death for killing a cellmate, resides at the Special Confinement Unit ("SCU") of USP-TH. (7th Cir. JA at 125).[1] The

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[1] Although Mr. Hammer's death sentence was later vacated, no date has been set for resentencing, and the government has been granted an extension of time to April 28, 2010 to state its intentions with respect to resentencing. *See United States v. Hammer*, No. 96-CR-239 (M.D. Pa. Aug. 27, 2009) (order granting United States an extension of eight months to indicate whether it will request a new death penalty phase trial); *United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005), *appeals dismissed*, 564 F.3d 628 (3d Cir. 2009). As respondents concede, Mr. Hammer continues to reside on death row and is subject to the policy. (App. 4a, 32a n.1).

SCU houses all male federal prisoners who have been sentenced to death. (7th Cir. JA at 200). In addition, the SCU houses prisoners who have not been sentenced to death, but who have been placed on "administrative detention status." (7th Cir. JA at 200).

Mr. Hammer has received many requests for press interviews to discuss conditions on death row, his own case, and other matters related to his confinement. In 1999, Mr. Hammer participated without incident in three face-to-face press interviews. (7th Cir. JA at 126-28). Those interviews were conducted under 28 C.F.R. § 540.63, which permits federal prisoners to participate in face-to-face interviews unless a warden determines, after an individualized inquiry, that the interview would "endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution." (App. 82a).

On March 12, 2000, "60 Minutes" aired an interview with Timothy McVeigh, a federal death row inmate known as the Oklahoma City Bomber. (7th Cir. JA at 175). The public outcry was immediate. Among other things, on March 14, 2000, Senator Byron Dorgan sent a letter to BOP Director Kathleen Hawk-Sawyer, to demand that the BOP prohibit future interviews with federal death row inmates. (7th Cir. JA at 175).

No other face-to-face interview with a male federal death row inmate was ever allowed.[2] In late 2000 and early 2001, Mr. Hammer attempted to communicate with the press through press releases issued by his attorney, through personal written correspondence, and by using his ordinary 15-minute daily allotments of telephone time. Even in these contexts, Warden Lappin repeatedly warned Mr. Hammer that he was prohibited from disclosing "*any* information about another inmate through any manner of communication (oral, written, etc.)." (7th Cir. JA at 172) (emphasis in original).

On April 12, 2001, Attorney General Ashcroft and BOP Director Hawk-Sawyer held a press conference announcing a categorical ban on face-to-face interviews with male federal death row inmates. That ban (which was not adopted pursuant to notice-and-comment rulemaking) permanently and categorically prohibits male federal death row inmates (but not female death row inmates, non-death row inmates housed on the SCU, or, indeed, any other inmate in the federal prison system) from having face-to-face interviews with any print or broadcast journalist on any subject at any time. (App. 95a-96a). The Attorney General explained:

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[2] From March 2000 until April 16, 2001, USP-TH Warden Lappin denied all media requests for face-to-face interviews with male federal death row inmates, including nine such requests for interviews with Mr. Hammer. (7th Cir. JA at 177-92). After April 16, 2001, THA-1480.05A was specifically invoked to bar such interviews. (App. 105a).

> As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as Attorney General of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. . . . I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

(App. 90a, 97a).

Four days later, Warden Lappin signed Institution Supplement THA-1480.05A, which purportedly was designed to "provide guidelines for implementing" the case-by-case review process required by 28 C.F.R. § 540.63. (App. 103a). In fact, THA-1480.05A did not "implement" the regulation; it negated the regulation insofar as death row inmates were concerned. In place of the case-by-case review required by 28 C.F.R. § 540.63, THA-1480.05A substituted a permanent and total ban, stating that "in-person interviews (including video-recorded interviews) will not be permitted." (App. 105a). In addition to banning the broadcast of recorded interviews, the policy banned all face-to-face interviews, even non-recorded interviews with print journalists. (App. 105a).

It is undisputed that THA-1480.05A does not apply (a) to prisoners housed on the SCU on "administrative detention status," (b) to female federal prisoners sentenced to death, (c) to other

federal prisoners who have been convicted of murder, but not sentenced to death, or (d) to other federal prisoners who may be objects of acute public interest because of who they are or what crimes they have committed. (App. 35a, 105a). With respect to each of those four groups of prisoners, interview requests remain subject to the case-by-case policy set forth in 28 C.F.R. § 540.63. (App. 81a-84a).

C. Procedural History

Mr. Hammer filed an amended *pro se* complaint on January 2, 2003, claiming that THA-1480.05A violated both his First Amendment rights and his Fifth Amendment right to equal protection of the laws. He sought declaratory and injunctive relief, as well as damages, under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (7th Cir. JA at 26-40).[3] Mr. Hammer served three separate *pro se* discovery requests. (7th Cir. JA at 56-62). Respondents objected to all of those requests and moved for summary judgment, without complying with any of the requests. (7th Cir. JA at 63-65, 76-86).

Mr. Hammer filed a *pro se* motion to extend the time for discovery under Fed. R. Civ. P. 56(f), but the district court denied that motion. (7th Cir. JA 87-90,

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[3] Mr. Hammer filed his original *pro se* complaint on April 24, 2001. The district court dismissed that complaint for failure to state a valid claim for relief. (App. 79a). Mr. Hammer filed a *pro se* appeal. The Seventh Circuit reversed and remanded the case for further proceedings, including discovery, on July 25, 2002. (App. 70a).

225). Thereafter, the district court granted summary judgment against Mr. Hammer, holding that "Hammer has not identified a genuine issue of material fact as to his claims . . . ." (App. 62a). Mr. Hammer filed a timely notice of appeal, and the Seventh Circuit later appointed counsel to assist Mr. Hammer with the briefing and argument of his appeal. (7th Cir. JA at 238-39).

On January 15, 2008, a panel of the Seventh Circuit unanimously reversed the district court's grant of summary judgment. The panel held that Mr. Hammer had raised a triable issue of fact as to whether the "proffered [security] justification for the policy banning face-to-face interviews is pretextual." (App. 32a). That was so, according to the panel, because Attorney General Ashcroft's contemporaneous explanation conflicted with respondents' litigation declarations and showed that the actual purpose of the ban was "to control a disfavored message rather than to secure the SCU." (App. 41a).

The Seventh Circuit granted respondents' petition for rehearing *en banc*. (App. 3a).

On June 25, 2009, the Seventh Circuit, by a 5-to-3 vote, held that "Institution Supplement THA 1480.05A is consistent with the Constitution." (App. 15a). In an opinion by Chief Judge Easterbrook, the court held that respondents' actual reasons for adopting the ban were not relevant because "[i]t is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a). The "good reasons," of course, were not those

stated at the time the ban was adopted, but those that respondents put forth in defense of Mr. Hammer's litigation, some three years later. Indeed, according to the majority, it was not necessary for respondents to provide any reasons at all, even after the fact. So long as a court could hypothesize "good reasons" for the ban, there was no need for discovery or a trial concerning the abridgement of Mr. Hammer's First Amendment rights. (App. 5a, 10a-11a). The majority further held that "[t]he Supreme Court did not search for 'pretext' in *Turner*; it asked whether a rule is rationally related to a legitimate goal. That's an objective inquiry." (App. 10a).

Three judges dissented. Judge Rovner, joined by Judge Bauer, noted that:

> With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech.

(App. 16a).

Judge Wood dissented separately. Among other things, she noted that "the majority has . . . adopt[ed] a rule permitting wholesale censorship in prisons — one that goes much farther than anything the

Supreme Court sanctioned in *Pell v. Procunier*, 417 U.S. 817 (1974), or *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)." (App. 24a).

REASONS FOR GRANTING THE WRIT

1. This case raises a fundamental question of First Amendment law on which the courts of appeals are divided. In a 5-3 decision with far-reaching consequences, the *en banc* court held that a federal prisoner could not challenge the constitutionality of a policy prohibiting him from having face-to-face access to print or broadcast journalists, even if there was evidence to show that the ban was adopted for unconstitutional, content-based purposes.

Indeed, the evidence here was compelling: Attorney General Ashcroft stated that the purpose of the ban was to prohibit death row inmates from communicating their ideas to the public, not because of any reason related to prison security, but because the Attorney General deemed such prisoners, and any ideas they might express, to be repugnant and unworthy of First Amendment protection. (App. 90a, 97a). That evidence was irrelevant, according to the majority below, because respondents had provided litigation declarations asserting that the ban served a "legitimate penological interest." That evidence was also irrelevant, according to the majority below, because a court could "imagine" a legitimate purpose that might be furthered by the ban.

This Court has never held that the abridgement of First Amendment rights may be justified by after-the-fact or imagined reasons, or that the actual,

unconstitutional reasons for an abridgement of First Amendment rights should be ignored.

Clearly, the decision below conflicts with this Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987). In addition, the decision below conflicts with decisions of the Second, Third, Eighth, and Ninth Circuits, all of which have held that the existence of a "legitimate penological interest," and thus the constitutionality of restrictions placed on a prisoner's First Amendment rights, must be measured by reasons that were put forth at the time the policy was adopted. In those courts, unlike the Seventh Circuit, First Amendment rights do not give way to *post-hoc*, let alone hypothetical, explanations. *See Salahuddin v. Goord*, 467 F.3d 263, 276-77 (2d Cir. 2006); *Abu-Jamal v. Price*, 154 F.3d 128, 132-34 (3d Cir. 1998); *Quinn v. Nix*, 983 F.2d 115, 118-19 (8th Cir. 1993); *Walker v. Sumner*, 917 F.2d 382, 385-87 (9th Cir. 1990).

2. Although this Court has held that prison restrictions on First Amendment rights are to be evaluated under the four-part test articulated in *Turner v. Safley*, 482 U.S. 78 (1987), the Seventh Circuit barely mentioned any of the *Turner* factors and effectively created an analytical framework that stands in competition with *Turner*. The Seventh Circuit's decision did not even purport to address the question whether THA-1480.05A "is reasonably related to legitimate penological interests" under the four-factor *Turner* test, and it never considered whether the ban provided male federal death row inmates with any reasonable alternative means for

communicating with the press. *See Turner*, 482 U.S. at 89-90. Furthermore, the decision below constitutes a dangerous innovation in First Amendment law: no other reported decision has ever upheld the constitutionality of a *permanent* restriction on the First Amendment rights of a *sub-class* of prisoners, particularly a sub-class identified solely based on gender and sentence. Indeed, this Court previously has expressed skepticism that a permanent ban on the First Amendment rights of a sub-class of prisoners could ever be deemed "reasonable" under the *Turner* criteria. *Beard v. Banks*, 548 U.S. 521, 535-36 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003). This case squarely presents that question.

I. The Decision Below Conflicts With Prior Decisions Of This Court, And With Decisions Of Other Federal Courts Of Appeals, By Holding That *Turner*'s "Legitimate Penological Interest" Requirement May Be Satisfied By *Post-Hoc*, Litigation Declarations Or By Purely Hypothetical Explanations, Even Where Contemporaneous Statements Show That The Restriction Was Adopted For Patently Unconstitutional Reasons.

This Court has long recognized that "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights . . . justified by the considerations underlying our penal system.'" *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (*quoting Price v. Johnson*, 334 U.S. 266, 285 (1948)). But this Court also has recognized that

there is no "iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

Indeed, this Court has recognized that the ability to share one's ideas and opinions with others is a fundamental right that is central to the concept of human personhood and citizenship in a democratic society. As Justice Brandeis noted long ago:

> Those who won our independence . . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The right to communicate one's thoughts — a right that is no less important to those who have lost their physical freedom — is not extinguished by conviction and incarceration. Once the requirements of prison security have been satisfied, "a prison inmate retains those First Amendment rights that

are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see also Johnson v. California*, 543 U.S. 499, 510 (2005). In that way, our law gives recognition to the fundamental principle that "persons are sent to prison as punishment, not for punishment." *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977); *see also* Mary Bosworth, *The U.S. Federal Prison System* 53 (2004).

To reconcile the First Amendment rights of prisoners with legitimate penological demands, this Court, in *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), announced a framework for evaluating the constitutionality of prison regulations. In *Turner*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. To structure that inquiry, the Court adopted a four-factor test, focused on: (1) whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether "alternative means of exercising the right . . . remain open to prison inmates"; (3) whether accommodating the constitutional right will significantly impact prison resources; and (4) whether there are "ready alternatives" that could address the penological interest without infringing on constitutional rights. *Id.* at 89-91.

In *Turner*, this Court did not specifically explain how, in the context of *Turner*'s first requirement, the requisite reasonable relationship between a restriction and a legitimate penological purpose was to be established. *Id.* at 89. In subsequent cases, the Court likewise has not had occasion to consider whether a "legitimate penological interest" must be articulated at the time the policy is adopted. Thus, while this Court has held that *Turner* requires courts to "accord substantial deference to the professional judgment of prison administrators," *Bazzetta*, 539 U.S. at 132, the Court did not consider whether such deference must be given to non-contemporaneous explanations offered only in litigation declarations authored by lawyers long after the fact. Certainly, no case from this Court suggests that a *post-hoc* explanation will be given conclusive effect in the face of contemporaneous statements which admit that the contested action was taken for constitutionally impermissible reasons. Moreover, relevant decisions from the courts of appeals have categorically rejected that notion.

In addition, this Court has never suggested that the *Turner* test will be satisfied whenever the reviewing court can "imagine" a legitimate penological interest. Indeed, the holding below simply negates this Court's decision in *Turner*, which assumed that the courts would inquire into the adequacy of the real reasons for administrative action, rather than some hypothetical reason that might be conjured to justify the administrative

determination. That is not the standard by which administrative action is evaluated.[4]

The Seventh Circuit held otherwise. The Seventh Circuit noted that Mr. Hammer had presented evidence (including the Attorney General's contemporaneous explanation for his actions) to show that "those who adopted or approved THA 1480.05A took content or viewpoint into account"

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[4] This Court often has had occasion to hold that administrative determinations may be upheld only on grounds that the agency actually relied on at the time it acted, and that the propriety of an agency's action must be evaluated based on a properly developed administrative record. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("*Chenery I*"); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery II*"); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50-52 (1983). "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Chenery II*, 332 U.S. at 196-97.

A reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency [at the time it acted]. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.* at 196; *accord Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 419-20 (1971). Contrary to the decision below, untested, *post-hoc* litigation affidavits cannot fill that void, particularly where, as here, the affidavits directly contradict the rationale given by the decision-maker at the time he acted. *See Overton Park*, 401 U.S. at 419; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *Chenery I*, 318 U.S. at 87.

when they adopted the permanent ban. (App. 7a, 8a-9a). According to the Seventh Circuit, however, a contemporaneous admission of an unconstitutional purpose was not relevant to *Turner*'s "legitimate penological interest" requirement, so long as the court record contained a *post-hoc* litigation declaration asserting that the challenged action furthered some legitimate penological interest. (App. 10a-11a). Indeed, the Seventh Circuit held that a court could enter summary judgment so long as it could hypothesize a plausible permissible penological interest, even where a patently unconstitutional, contemporaneous explanation had been given. (App. 5a, 10a-11a). The Seventh Circuit majority stated: "It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons." (App. 10a).

The Seventh Circuit's decision clearly conflicts with decisions of the Second, Third, Eighth, and Ninth Circuits, which have held that the only relevant "penological interest" is that which *actually* motivated the policy's adoption.

In *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006), the Second Circuit reversed a district court's dismissal, on summary judgment, of a prisoner's challenge to a rule requiring Sunni and Shi'ite Muslim inmates to participate in joint Ramadan services, as well as the dismissal of his claim that he was denied the opportunity to participate in Islamic holiday services while placed in disciplinary keeplock. The Second Circuit held that "[u]nder both *Turner* and *O'Lone*, once a prisoner shows that a

prison regulation impinges on a protected right, prison officials must show that the disputed official conduct was motivated by a legitimate penological interest." *Salahuddin*, 467 F.3d at 276-77. According to the Second Circuit, *Turner*'s "legitimate penological interest" standard "requires the government to close the circle — prison officials must have been pursuing the interest in inmate safety when limiting" First Amendment rights. *Id.* at 277. "This requirement makes good sense because it ensures that prison officials actually had, not just could have had, a legitimate reason for burdening protected activity." *Id.*

In *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), the Third Circuit ordered the district court to issue a preliminary injunction enjoining enforcement of a policy that prohibited inmates from running businesses after the policy was challenged by a death row inmate who was publishing articles, books, and radio commentaries. In that case, as here, the inmate had presented evidence to show that the "[t]he Department [of Corrections] began its investigation [into the inmate's press communications] under public pressure to do so, and because of the content of [his] writing," and that the decision to enforce the policy against him was "motivated, at least in part, by the content of his articles." *Abu-Jamal*, 154 F.3d at 134. Based on this evidence of an improper purpose, the Third Circuit held that the policy did not satisfy *Turner*'s "legitimate penological interest" requirement. *Id.* at 134, 137.

In *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993), the Eighth Circuit likewise held that a "pretextual" *post-hoc* articulation of security concerns could not satisfy *Turner*, because "[p]rison officials are not entitled to the deference described in *Turner* and *Procunier* [*v. Martinez*, 416 U.S. 396, 404-05 (1974)] if their actions are not *actually* motivated by legitimate penological interests at the time they act." *Quinn*, 983 F.2d at 118 (emphasis added).

Finally, in *Walker v. Sumner*, 917 F.2d 382 (9th Cir. 1990), the Ninth Circuit held that "[p]rison officials must 'put forward' a legitimate governmental interest to justify their regulation, and must provide *evidence* that the interest proffered is the reason why the regulation was adopted or enforced." *Id.* at 385-86 (internal citations omitted). *Post-hoc* declarations created for litigation were not sufficient to satisfy *Turner*. "Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests." *Id.* at 386.

The Seventh Circuit's holding directly conflicts with these decisions, as Judge Rovner recognized:

> With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the

> application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech. The *en banc* opinion thus authorizes the government to deny the public a chance to hear directly from prisoners who can offer a glimpse of situations that may embarrass the government, such as torture and prisoner abuse, by invoking pretextual justifications for policies that are unrelated to security.

(App. 16a).

There is no constitutional right more precious in a democratic society than the right to speak, convey information about the workings of government, and communicate one's ideas, whatever they may be. Equally important is the right to receive information and to hear what others have to say about matters of public concern. In our day, much public attention has been given to the administration of the death penalty and to the proper treatment of prisoners. Indeed, these matters have been the subject of acute public attention and vigorous debate. In this context, the ban ordered by Attorney General Ashcroft does not simply abridge the First Amendment rights of those with special knowledge and a particular viewpoint, it impedes the right of all of us to hear what those individuals know and think.

Judge Wood illustrated this point with a vivid example:

> It is likely that the military authorities running the infamous Abu Ghraib prison would not have wanted the inmates talking to the media, either about their own experience or those of their fellow prisoners (some of whom may have been too injured, or too intimidated, to speak for themselves). Closer to home, the sad but true fact is that abuse by prison guards or police has not been entirely abolished. One prisoner might want to write letters that are self-aggrandizing, just as the authorities feared, but another might want to alert the media to the fact that human rights abuses were occurring in a place like the Special Confinement Unit.

(App. 28a).

The rights to speak and hear are too important in themselves, and play too important a role in the workings of a democratic society, to be extinguished by executive fiat simply because the Attorney General, no matter how wise or well-meaning, finds communications from a subset of federal prisoners to be personally repugnant. Justice Jackson identified the genius of our governmental system, and its relationship to First Amendment freedoms, when he wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Mr. Hammer may have been convicted of serious crimes, but he retains the right to speak, subject to the legitimate demands of prison security. And the rest of us, subject to those demands, have the right to hear what Mr. Hammer has to say. Neither the Attorney General nor the court below paid sufficient attention to that basic fact of democratic government, and the decision below requires review for that reason.

II. The Decision Below Departs From This Court's Prior Holdings By Disregarding *Turner* And Upholding The Constitutionality Of A Permanent Restriction On The First Amendment Rights Of A Sub-Class Of Prisoners.

This Court has repeatedly held that *Turner*'s four-factor analysis "contain[s] the basic substantive legal standard[s]" and is the proper inquiry for evaluating constitutional challenges to prison regulations. *Banks*, 548 U.S. at 528-29; *Bazzetta*, 539 U.S. at 132; *Thornburgh v. Abbott*, 490 U.S. 401, 404, 413-14 (1989); *O'Lone*, 482 U.S. at 348-50. The decision below warrants review for the additional reason that the Seventh Circuit simply disregarded *Turner* and its progeny, and chose to create its own standard for reviewing the constitutionality of prison restrictions.

Instead of assessing Mr. Hammer's claims under the *Turner* framework, the court below used the opinions in two older cases — *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*,

417 U.S. 843 (1974) — to fashion an alternative test. (App. 1a-2a, 4a-7a, 13a-14a).

Obviously, it is not the business of an intermediate appellate court to improve on this Court's jurisprudence. Even if it were, the court below erred because neither *Pell* nor *Washington Post* would support upholding THA-1480.05A. Unlike the policy upheld in this case, the press restrictions in *Pell* and *Washington Post* applied equally to all inmates in their respective prison systems. *Pell*, 417 U.S. at 819; *Washington Post*, 417 U.S. at 844. In addition, and also unlike the case at bar, it was undisputed in both *Pell* and *Washington Post* that the restrictive policies were actually motivated by legitimate "security" concerns. *Pell*, 417 U.S. at 826; *Washington Post*, 417 U.S. at 848-49.

Moreover, neither policy restricted an inmate's ability to communicate with the press through written correspondence (*Pell*, 417 U.S. at 824, 827-28; *Washington Post*, 417 U.S. at 847-48), whereas Mr. Hammer has been prohibited from communicating to the press "*any* information about another inmate through any manner of communication (oral, written, etc.)." (7th Cir. JA at 172). As Judge Wood stated in dissent:

> [N]either *Pell* nor *Washington Post* approved a total ban on contact with the media. To the contrary, *Pell* relied on the existence of "alternative methods of communication that are open to prison inmates," 417 U.S. at 504, and *Washington Post* made clear that

> "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there," 417 U.S. at 518. *Washington Post* mentioned specifically the fact that "[o]utgoing correspondence from inmates to press representatives is neither censored nor inspected." *Id.* To the extent that the majority's opinion has swept away the need to show adequate alternative avenues for communication [under *Turner*'s second factor], it has, in my view, overstepped an important boundary that the Court has drawn.

(App. 29a). Unlike *Pell* and *Washington Post*, Mr. Hammer presented evidence creating a triable question as to whether any "reasonable alternatives" existed for him to communicate with the press regarding his case or his observations of prison conditions — both being subjects that he was prohibited from discussing in *any* manner because of the ban on communications regarding fellow inmates. (App. 110a; 7th Cir. JA at 172).

The court below also erred in holding that this Court's decisions in *Pell* and *Washington Post* can be extended to justify First Amendment restrictions applied only to a sub-class of prisoners — especially a sub-class defined solely by gender and sentence. While *Pell* and *Washington Post* may permit prison officials to bar all inmates equally from face-to-face communication with the media, the Constitution does not permit prison officials to grant the right to communicate with the press selectively, or to deny

face-to-face communication with the press to a disfavored group. *See Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981) ("The Constitution forbids [the government] to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (holding that government's power to proscribe "fighting words" generally does not include power to punish only "fighting words" directed at particular disfavored topics).

While real differences between male and female death row inmates (or between death row inmates and inmates convicted of similar crimes but not sentenced to death) might necessitate some differences in their conditions of confinement, it is not clear how those differences could ever be relevant to adopting, let alone justifying, differential treatment under the First Amendment. "Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among [groups] on such a wholesale and categorical basis." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). This Court has recognized that "invidious distinctions [in the allocation of constitutional rights] cannot be enacted without a violation of the Equal Protection Clause." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Restricting only male federal death row inmates from face-to-face interviews with both print and electronic media (while allowing such access to all other federal prisoners, including female federal

death row inmates) fails even rational-basis analysis under *Turner*'s first criteria that a restriction be "reasonably related to legitimate penological interests." 482 U.S. at 89.

The permanent nature of the Attorney General's ban also offends the Constitution. Indeed, neither this Court nor any other court has approved a permanent restriction on First Amendment rights that applies only to a sub-class of prisoners, let alone a sub-class defined entirely by gender and sentence. This Court has upheld prison restrictions on First Amendment rights in two contexts. First, the Court has upheld "permanent" restrictions that apply equally and neutrally to an entire prison population. *See Abbott*, 490 U.S. at 409-10, 415-16; *Turner*, 482 U.S. at 81, 89-90; *O'Lone*, 482 U.S. at 350-52; *Pell*, 417 U.S. at 828; *Bell v. Wolfish*, 441 U.S. 520, 551 (1979). Second, this Court has upheld *temporary* restrictions on First Amendment rights applied to a sub-class of recalcitrant inmates as a disciplinary sanction. *See Bazzetta*, 539 U.S. at 134; *Banks*, 548 U.S. at 535-36. No reported case, however, has upheld a permanent prison restriction on First Amendment rights applied only to a sub-class of prisoners based on gender and sentence.

Under 28 C.F.R. § 540.63, a federal prisoner will be permitted to participate in a face-to-face press interview unless his warden determines, after a case-specific inquiry, that permitting the interview would endanger the safety of the interviewer or "would *probably* cause *serious* unrest or disturb the good order of the institution." 28 C.F.R. § 540.63(g)(4)

(emphasis added) (App. 82a). Female federal death row prisoners, prisoners housed in the SCU with death row prisoners because of individualized security concerns, and all other non-death row prisoners are entitled to have press interview requests evaluated by their respective wardens, on a case-by-case basis, under the test set forth in 28 C.F.R. § 540.63. (App. 81a-84a).

In the case of male death row prisoners, however, no such case-by-case analysis is available, and the warden has no duty to make the reasoned decision required by 28 C.F.R. § 540.63. Instead, male inmates sentenced to death are categorically prohibited from having face-to-face press interviews by THA-1480.05A. (App. 105a).

This Court has previously expressed skepticism that a permanent restriction on the First Amendment rights of a sub-class of prisoners could ever satisfy the *Turner* standard. In *Bazzetta*, 539 U.S. at 134, the Court stated:

> We agree the restriction is severe. And if faced with evidence that [the] regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case. . . .

539 U.S. at 134; *see also Banks*, 548 U.S. at 536.

Here, of course, those issues are squarely presented. The Seventh Circuit went well beyond this Court's jurisprudence by upholding a ban on

First Amendment rights that was both "severe" and "permanent" and applied only to "certain inmates." It is not surprising that the Seventh Circuit declined to evaluate the ban at issue in this case under the *Turner* framework. The reason is clear: it is inconceivable that the First Amendment restrictions imposed by THA-1480.05A could ever pass muster under *Turner* and its progeny. This case warrants review for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals,
Seventh Circuit

DAVID PAUL HAMMER, Plaintiff-Appellant,
v.
JOHN D. ASHCROFT, et al., Defendants-Appellees.

No. 06-1750

ARGUED SEPTEMBER 10, 2008—
DECIDED JUNE 25, 2009

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 01-0558-C-T/G—John Daniel Tinder, Judge.

Before EASTERBROOK, Chief Judge, and BAUER, POSNER, KANNE, ROVNER, WOOD, EVANS, and SYKES, Circuit Judges.†

EASTERBROOK, Chief Judge. "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public." *Pell v. Procunier*, 417 U.S. 817, 834 (1974). The Supreme Court applied that principle in *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), when holding that the Federal Bureau of Prisons did not violate the Constitution by preventing face-to-face interviews between reporters and inmates.

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† Circuit Judges Flaum, Williams, and Tinder did not participate in the consideration or decision of this appeal.

In the years after *Washington Post* the Bureau authorized some in-prison interviews. By the late 1990s reporters could talk to prisoners throughout the federal system. See Program Statement 1480.05 (News Media Contacts) (promulgated Sept. 21, 2000, and in force since). That changed in 2001, however, for inmates housed in some of the Bureau's most-secure locations—including the "Special Confinement Unit" at the prison in Terre Haute, Indiana, which houses most federal prisoners under sentence of death, plus some others in administrative detention for disciplinary or security reasons.

Program statements generally applicable to federal prisons may be modified by institution-specific supplements. See Program Statement 1480.05(13) (applying this exception-making power to media contacts in particular). The Warden of Terre Haute proposed, and the Bureau's Director approved, Institution Supplement THA 1480.05A, which bans person-to-person meetings between reporters and inmates of the Special Confinement Unit, though it allows phone calls and correspondence. (The current revision, THA 1480.05B, contains the same rule; for simplicity we refer only to THA 1480.05A.) Phone calls with reporters are subject to Program Statement 1480.05(7)(d), which provides that "[a] representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed." Correspondence is unlimited; an inmate's letters to reporters are not subject to inspection or censorship.

"All properly identified and labeled correspondence from an inmate who is not on restricted mail status to qualifying representatives of the news media shall be sealed and forwarded without inspection, directly and promptly." Program Statement 5265.11(17)(a) (July 9, 1999).

David Paul Hammer, who was sentenced to death for killing another federal prisoner, contends in this suit under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), that he is entitled to money damages from former Attorney General Ashcroft and other public officials who drafted or approved THA 1480.05A. Relying on *Pell* and *Washington Post*, the district court granted summary judgment for the defendants. 2006 U.S. Dist. LEXIS 9306 (S.D. Ind. Feb. 23, 2006). A panel of this court reversed, 512 F.3d 961 (7th Cir. 2008), and that decision was vacated in turn by the order granting defendants' petition for rehearing en banc.

Hammer's attempt to obtain damages has complicated matters. The validity of federal administrative rules usually is resolved in actions under the Administrative Procedure Act seeking prospective relief, not in suits for money against officials whose positions and roles generally entitle them to qualified if not absolute immunity. A district judge held the policy valid, after all. Although the panel thought that, on an enlarged record, Hammer might yet prevail, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing

side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Accord, *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009). Indeed, a *Bivens* action is improper when statutes specify how administrative deeds are reviewed. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2597–2605 (2007). But because we agree with the district court that THA 1480.05A is valid, we sidestep the complications introduced by Hammer's quest for damages. (Hammer's death sentence was set aside in 2005, *United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005), but he remains in the Special Confinement Unit pending appeal, now under advisement in the Third Circuit, and so has an ongoing interest in the rule's constitutionality. His other sentences exceed 1,200 years' imprisonment, so release is not imminent.)

Pell v. Procunier and *Saxbe v. Washington Post* establish that the Bureau of Prisons could enforce a system-wide rule against personal or video interviews between prisoners and reporters. Hammer contends, however, that by curtailing press access to some prisoners but not others, the Bureau offends the equal-protection component of the due process clause in the Constitution's fifth amendment. Yet it is hard to understand why all prisoners should be treated the same. Some are in minimum-security prisons and others in more secure confinement; no one thinks these differences unconstitutional. The Justices observed in *Pell* and *Washington Post* that the principal reason for limiting press contacts is the maintenance of security; this implies that the greater the need for security at a given prison (or unit within

a prison), the easier it is to justify limits on meetings between reporters and prisoners. By the time the Court decided *Washington Post*, the Bureau of Prisons had begun to allow reporters to interview inmates of minimum-security prisons. *See* 417 U.S. at 844 & n.2. The Justices did not perceive any problem in this distinction. It is easier to justify limiting press contacts at the few places holding the most incorrigible prisoners (USP Florence and the Special Confinement Unit at Terre Haute) than at all medium- and maximum-security prisons.

Hammer's argument amounts to a contention that, once a prison system starts to allow access more liberally, it must go all the way; any intermediate position violates equal-protection principles. That understanding is inconsistent with many established doctrines. For example, thirty years ago a court held that Congress had violated equal-protection limits by subjecting members of the diplomatic service, but not other federal workers, to mandatory retirement. The Justices held, however, that it is possible to draw such lines as long as a rational basis for them may be imagined; the basis need not be supported in the record. *Vance v. Bradley*, 440 U.S. 93 (1979). Just as it was possible to imagine a rational basis for distinguishing diplomats from postal carriers, so it is possible to imagine a rational basis for distinguishing the nation's most secure institutions from others. Indeed, to state the distinction is to furnish the justification: security.

The security justification that carried the day in *Pell* and *Washington Post* was that interviews with the press make celebrities of some inmates. This increases tensions within prisons (those who don't receive public attention may react with envy); and if some inmates use the press to disparage others (or their beliefs, or the organizations to which they belong), the tensions will be greater. More: the interviewed prisoners get swelled heads and "tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison." *Washington Post*, 417 U.S. at 848–49. Prisons for tax evaders and credit-card forgers may tolerate such tensions; prisons for killers are more explosive, and the need to prevent lighting the fuse to the powder keg is compelling.

Hammer maintains that prisons must use the least-restrictive available options and that the Bureau's experience since *Washington Post* shows that the risks associated with interviews are manageable. This line of argument marks a transition from equal protection to the first amendment, for it incorporates elements of both bodies of doctrine. But this, too, is a tired theme. It has been made in several cases dealing with press interviews and correspondence among prisoners, and the Justices have rejected it. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 409–14 (1989); cf. *Shaw v. Murphy*, 532 U.S. 223 (2001). The question is not whether prisons could find ways to accommodate one or another change. It is whether the rule that the prison chooses to implement is "reasonably related to legitimate security interests."

Turner v. Safley, 482 U.S. 78, 91 (1987). And the Court has held in *Pell* and *Washington Post* that a no-interview policy *is* "reasonably related to legitimate security interests." The Justices added that an attempt to be "less restrictive" by making individual decisions could undermine security: "such a selective policy would spawn serious discipline and morale problems of its own by engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows." *Washington Post*, 417 U.S. at 849.

Hammer maintains, however, that the Bureau has engaged in content or viewpoint discrimination by silencing inmates on death row. This may well be true of a selective (or "less restrictive") approach; wardens who allow some prisoners but not others to invite the press into their cells might well take account of what they expect the inmates to say or the reporters to relate to the public. But a blanket ban—*no* inmate in a given prison or unit may meet face-to-face with *any* reporter—is neutral with respect to both content and viewpoint. This is one reason why the Justices approved the policies at issue in *Pell* and *Washington Post*, giving the exception-free quality of the policies as proof that the decisions were not based on content. *See Pell*, 417 U.S. at 825–26.

Perhaps Hammer's point is not that the *rule* employs content or viewpoint as a ground of decision, but that those who adopted or approved THA 1480.05A took content or viewpoint into account when deciding to change the rules for some federal prisoners but not

others. This line of argument starts with the fact that reporters freely interviewed inmates of the Special Confinement Unit, including Hammer himself, for the first nine months of the Unit's existence—until shortly after an interview with Timothy McVeigh was broadcast by CBS on "60 Minutes" in March 2000. (The Special Confinement Unit was established in July 1999; Hammer and McVeigh were among its first inmates.) McVeigh had been sentenced to death for killing 168 people by bombing the Murrah Federal Building in Oklahoma City. He used the forum of national TV to justify and extol terrorism. Shortly after the interview was broadcast, Byron Dorgan, who represents North Dakota in the Senate, wrote to Kathleen Hawk-Sawyer, Director of the Bureau of Prisons, complaining about the interview. Senator Dorgan stated, among other things:

> The American people have a right to expect that the incarceration of a convicted killer will not only remove him physically from society, but will also prevent him from further intrusion in our lives through television interviews and from using those forums to advance his agenda of violence.

About a month after Senator Dorgan sent that letter, Attorney General Ashcroft and Director Hawk-Sawyer announced arrangements for closed-circuit telecasting of McVeigh's execution and took some questions. Ashcroft also announced that the Bureau would replace its case-by-case evaluation system with a prohibition on in-person interviews of inmates

at the Special Confinement Unit. Hammer finds telling these statements:

> I am aware that several media outlets have requested access to interview inmate McVeigh. As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as Attorney General of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims.
>
> . . .
>
> I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

On April 15, 2001, three days after the press conference, Harley Lappin, the Warden of Terre Haute, issued Institution Supplement THA 1480.05A.

Hammer wants discovery during which former Attorney General Ashcroft, former Director Hawk-Sawyer, and former Warden Lappin must explain under oath why they adopted the policy in question. If a belief that terrorists should not be able to obtain publicity by committing murder played a role in the decision, Hammer contends, the motivation for the policy is infirm, and the policy itself would fall with the bad motive.

It is not clear why one bad motive would spoil a rule that is adequately supported by good reasons. *See Mueller v. Allen*, 463 U.S. 388, 394–95 (1983). The Supreme Court did not search for "pretext" in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal. That's an objective inquiry. If motive matters, why examine the thoughts of those who adopted the rule to the exclusion of those who have maintained it in force?—Attorney General Gonzales, Solicitor General Clement (who authorized the petition for rehearing en banc), Attorney General Mukasey (who was in office when the Department of Justice defended the policy before the en banc court), and Attorney General Holder, who could revoke THA 1480.05A with one sentence plus a signature but has not done so. (There is no special burden to justify a change of administrative policy. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 & n.2 (2009).)

Nor do we see how a demand that a Cabinet officer give testimony about his thinking could be squared with *United States v. Morgan*, 313 U.S. 409 (1941), and *PBGC v. LTV Corp.*, 496 U.S. 633 (1990). These decisions hold that courts evaluating the validity of an administrative action may not enlarge the administrative record by demanding that the people who proposed or approved the rule testify about their thinking. *See also* Richard J. Pierce, Jr., I *Administrative Law Treatise* § 8.6 (2002).

For current purposes, however, we assume that Attorney General Ashcroft's successors share his views. There's nothing unconstitutional about them, so we need not decide whether they led to the policy's adoption and maintenance, how motivation could be proved consistent with *Morgan*, or what role it plays in evaluating a policy's validity. Opposing a "culture of violence" is an ordinary, and desirable, goal for a criminal prosecutor. Attorney General Ashcroft's statements combine the idea that criminals should not be allowed to benefit from their deeds (see *Simon & Schuster, Inc. v. New York Crime Victims Board*, 502 U.S. 105 (1991) (a state may apply all of a criminal's income, including royalties from books, to satisfy restitution awards, though it can't pick and choose among books)) with variations of propositions that can be found in *Pell* and *Washington Post*.

One of the reasons that state and federal prison administrators gave for curtailing press access was that they did not want people to become celebrities by committing crimes. The Justices thought this a good basis to curtail press access, not a constitutionally infirm one. *See Washington Post*, 417 U.S. at 848-50. This is a reason why prisoners are separated from society: Most prisons are remote, and access to them tightly controlled, not simply to make escape difficult, but because solitude is a legitimate part of punishment. Becoming a celebrity makes crime more attractive—and if not so attractive as to outweigh the costs of prison, still anything that reduces the (effective) punishment for crime is of legitimate concern to Attorneys General

and prison officials. For murderers on death row or serving life sentences, celebrity is *especially* attractive, as these persons do not expect to return to the civilian world. They will receive few other rewards in life.

Some criminal acts are both costly to society and potentially attractive to imitators; the most notorious criminals can be trend-setters. Timothy McVeigh was such a person. He had a following, and one of his admirers was recently convicted of threatening to blow up a federal building in Milwaukee. *See United States v. Parr*, 545 F.3d 491 (7th Cir. 2008). Other "cause" criminals want to recruit; think of those who blow up abortion clinics and kill physicians. Social interests in curtailing and punishing crime support keeping these prisoners in seclusion. No one doubts—at least, no one *should* doubt—that a person serving time for tax evasion may be prevented from using the prison print shop to run off tracts advocating the proposition that the sixteenth amendment is invalid and no one need pay a penny of taxes. *See United States v. Benson*, 561 F.3d 718 (7th Cir. 2009) (affirming an injunction that prevents a convicted tax evader from selling a "16th Amendment Reliance Package" that purports to give other tax protesters a means to avoid both payment and criminal liability). If what Attorney General Ashcroft said in April 2001 evinces an unconstitutional motive, much of what this court wrote in *Benson* suffers from the same failing.

Naturally, Hammer insists that he is no McVeigh and would not use the press to promote murder. He wants to speak instead about prison conditions, his current professed respect for life, and what he sees as misconduct by guards and wardens. A system of rules that permitted prison administrators to conceal beatings or starvation of prisoners, violations of statutes and regulations, and other misconduct would be intolerable. The Court said as much in *Pell* and *Washington Post*. It was important to both decisions that all prisoners could correspond freely with reporters, even though face-to-face interviews were impossible. *See Pell*, 417 U.S. at 824–28; *Washington Post*, 417 U.S. at 847–48. Hammer sees this as an opening, because (he says) the Bureau of Prisons does not allow any uncensored channel of communication to the press.

This line of argument relies on Program Statement 1480.05(7)(d), which we quoted at the outset of this opinion. It provides: "A representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed." As far as we can tell, this rule applies to interviews (in person or by telephone) but not to correspondence. Program Statement 5265.11(17)(a), which sets out the rules for written exchanges, says that "[a]ll properly identified and labeled correspondence from an inmate who is not on restricted mail status to qualifying representatives of the news media shall be sealed and forwarded without inspection, directly and promptly." That's exactly the sort of uncensored outgoing

correspondence that the Court deemed adequate in *Pell* and *Washington Post*. (Hammer does not contend that persons held in the Special Confinement Unit are "on restricted mail status" or that the prison has ever red-penciled any letter he sent to a reporter.) The limit on information about other inmates deals only with oral interviews. And if Hammer were to prevail in this suit, he would not be rid of Program Statement 1480.05(7)(d), for it covers in-person and televised interviews as well as phone interviews.

To the extent that Hammer may be contesting the validity of Program Statement 1480.05(7)(d) as applied to phone calls with the press (the only way it affects him), he has not established any constitutional problem. The restriction is a rational one, for reasons covered in *Pell* and *Washington Post*. Telling tales about fellow inmates may make them angry (if the tales are defamatory) or may make yet other inmates envious (if the tales are flattering). In either event, disorder may follow. As the district court put it, "insults or provocations, real or imagined, can result in inmate-on-inmate violence and thus can have dire consequences for inmates, penitentiary staff, and the public at large." 2006 U.S. Dist. LEXIS 9306 at *11-*12. Defamation is less likely if the other inmate agrees to talk to the press; Hammer may discuss such inmates by phone with reporters. And if, to take the worst case, another inmate is beaten and unable to talk, Hammer remains free to send a letter informing a reporter about that event. *Pell* and *Washington Post* held that

free correspondence supplies the needed channel of communication; Hammer has that plus 15 minutes of telephone time a day.

Correspondence is not the only way to expose misconduct by guards and administrators. Prisoners are free to file lawsuits, and papers sent to courts (or lawyers) cannot be censored. *See Bounds v. Smith*, 430 U.S. 817 (1977); *Procunier v. Martinez*, 416 U.S. 396 (1974). So the limit in Program Statement 1480.05(7)(d) is not going to conceal any misconduct in which the public has a legitimate interest.

Institution Supplement THA 1480.05A is consistent with the Constitution, and the judgment of the district court is

AFFIRMED.

ROVNER, *Circuit Judge*, with whom Judge Bauer joins, dissenting. The original panel's opinion was firmly rooted in the Supreme Court's long-standing rule that a prison regulation infringing on an inmate's constitutional rights is valid only if "it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). When a prisoner challenges a prison policy on constitutional grounds, the government must put forward a "legitimate" government interest to justify the restriction. *Id.* Suppressing speech because government officials find the content offensive is not a legitimate penological interest. *Id.* at 90. The original panel concluded that David Paul Hammer presented evidence that created a question of

material fact that the district court overlooked: is the jailhouse-celebrity concern articulated by the warden "legitimate," or is it simply a convenient explanation to justify a policy designed to control the speech content of a particular subset of prisoners? Given the fact dispute, the original panel reached the limited—indeed, even pedestrian—conclusion that a trier of fact must resolve the conflict.

Today's en banc opinion is almost entirely unmoored from the original panel's narrow treatment of the issues presented in this appeal. With scarcely a reference to *Turner*, today's opinion holds that a ban on face-to-face interviews in the prison system is justified if a judge can "imagine" a legitimate basis for its existence, glosses over facts regarding the application of the relevant policies, and concludes with the astonishing proposition that the government may limit a prisoner's access to the media based on its distaste for the anticipated content of the prisoner's speech. The en banc opinion thus authorizes the government to deny the public a chance to hear directly from prisoners who can offer a glimpse of situations that may embarrass the government, such as torture and prisoner abuse, by invoking pretextual justifications for policies that are unrelated to security. For the reasons set forth in the original panel's opinion, I dissent. I write separately only to memorialize my additional disagreement with the unexpected breadth of the en banc opinion.

Let me begin with the most troubling aspect of today's opinion: the majority's willingness to push

aside Attorney General Ashcroft's statement that "as an American who cares about our culture" and is "concerned about the irresponsible glamorization of a culture of violence," he wanted to prevent death-row inmates, and only death-row inmates, from engaging in face-to-face interviews with the media on any subject. This rationale for censorship assumes that what death-row inmates have to say, if broadcast outside the prison, necessarily corrodes American culture. But First Amendment jurisprudence is grounded in the idea that the government may not prevent a person, including a prisoner, from speaking merely because it disapproves of the speaker or what the speaker might say. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that "content-based restrictions are presumptively invalid"); *Turner*, 482 U.S. at 90 (stating that prison regulations that infringe on inmates' First Amendment rights must operate "in a neutral fashion, without regard to the content of the expression"); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."). Indeed, this court has recognized that the government may not pass speech restrictions in an effort to preserve its own notions of valued American culture:

> Racial bigotry, anti-semitism, violence on television, reporters' biases-these and many more influence the culture and shape our socialization. None is directly answerable by

> more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

See American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (Easterbrook, J.). Yet Attorney General Ashcroft said publicly that preserving his version of American culture is exactly why the Bureau decided to limit death-row inmates' access to the media.

In order to circumvent this problem, the majority applies its own interpretive spin to Attorney General Ashcroft's statements and decides that the Attorney General meant that "criminals should not be allowed to benefit from their deeds." The majority thus concludes that Attorney General Ashcroft articulated a legitimate penological purpose to the interview ban because he saw restricting face-to-face interviews as a form of punishment or deterrence. But that is a question for a fact finder, who might reject this post-hoc rationalization and instead take Attorney General Ashcroft at his word and conclude that what actually "shaped" his mind in enacting the ban is his desire to prevent death-row prisoners from influencing our "culture." That desire is not a legitimate penological purpose.

The majority's comparison of this case to *United States v. Benson*, 561 F.3d 718 (7th Cir. 2009), is

unhelpful. In *Benson* we held that a convicted tax offender may not market materials that encourage other people to evade tax laws. *Benson* dealt with commercial speech, which occupies its own niche in First-Amendment jurisprudence, *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980), and concluded that it is permissible to enjoin a person from making false statements in connection with the sale of a product, *Benson*, 561 F.3d at 725-26. Even accepting the majority's assumption that Attorney General Ashcroft wanted to prevent inmates from encouraging violence, the parallel to *Benson* is unpersuasive. Deceiving the public into buying a product designed to evade payment of required taxes is illegal, *see* 26 U.S.C. § 6700(a); advocating unpopular ideas is not, *see Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).[1]

The original panel was also concerned that the Special Confinement Unit's prohibition on face-to-face interviews does not leave sufficient alternatives for death-row inmates to access the media. Today's opinion concludes that the alternatives are sufficient because death-row inmates have 15 minutes of telephone time each day that they can use to speak with reporters, and because they are entitled to unlimited correspondence. But the government concedes that death-row inmates are not allowed—

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[1] Of course the government may regulate speech that amounts to incitement of violence, *see Brandenburg*, 395 U.S. at 447, but not even today's majority suggests that Ashcroft intended the media ban to target that category of speech.

through any method of communication—to discuss other inmates with members of the media. I am particularly troubled by this aspect of the policy because it may prevent inmates from reporting prison abuse. Under the current policies an inmate could be disciplined for informing the media—whether on the phone or by letter—that another inmate is being abused by a guard. When this concern was raised at the en banc argument, counsel for the defendants asserted that a victimized inmate could report the abuse himself. But that suggestion ignores the reality that any guard who abuses an inmate is likely to pressure his victim not to disclose the abuse, and such threats are particularly effective.

Today the majority brushes aside this concern, because "as far as [it] can tell," the ban on talking about other inmates does not apply to written correspondence. It relies on a program statement that says that outgoing mail to the media is sent without inspection. But at the en banc argument, counsel for the defendants said that all mail sent by inmates at the Special Confinement Unit must be given to prison officials unsealed for inspection before it is mailed. When asked what would be the consequence to an inmate who sends a letter discussing another inmate, counsel for the government had no answer. Thus our original fears are unabated; on this record we cannot tell whether there is any satisfactory alternative for inmates at the Special Confinement Unit to give the media any information that involves other inmates.

Which leads to another concern that today's opinion glosses over completely—Hammer was denied the opportunity to create a full record at the summary judgment stage. As discussed in the original opinion, the government moved for summary judgment before the close of discovery and only then responded to Hammer's discovery requests by objecting to them. Hammer asked for a continuance to allow him to build an adequate record, but the district court did not rule on his motion before the deadline for his summary-judgment response. To avoid missing his deadline, Hammer was forced to respond without receiving any discovery from the defendants. Today's opinion is quick to fill in the blanks itself in the face of ambiguity about the interests underlying the challenged policy. That is a task that may not have been necessary had Hammer had the chance to conduct proper discovery or if the district court had granted any of Hammer's three requests for counsel.

The majority's treatment of Hammer's equal-protection argument is also untethered from the governing legal standard and the facts of this case. The majority assumes that the media ban applies to all inmates housed in the Special Confinement Unit and concludes that the policy passes constitutional muster because the majority can "imagine a rational basis for distinguishing the nation's most secure institutions from others." But the parties agree that the media ban applies only to those members of the Special Confinement Unit who are under a death sentence. It is not, as the majority assumes, a unit-

wide ban, as not all inmates at the Special Confinement Unit are death-row inmates. That distinction casts doubt on the legitimacy of the "jailhouse celebrity" concern articulated by the government because, as Hammer point out, it is irrational to distinguish among inmates based solely on their particular sentence. Under the policy as applied by the Bureau of Prisons, famous mafia members, leaders of violent drug gangs, and the former governor of Illinois may all meet face-to-face with the press. But an unknown inmate under a death sentence may not because, the Bureau says, such access could make them "jailhouse celebrities." It is unclear why speaking in-person with a journalist would give an unknown death-row inmate more influence over other prisoners than would, for example, allowing Martha Stewart or George Ryan to give face-to-face interviews during their incarceration, which they would have been or are free to do under the Bureau's policies. As the majority points out, distinguishing among inmates risks "engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows." *See Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974). Yet here the Bureau of Prisons applies the media ban in such a way as to risk the very dangers it says it wants to avoid.

Finally, the majority is concerned that a remand in this case could subject the former, and perhaps current, Attorney General to discovery, and that any demand for his testimony would rub up against

United States v. Morgan, 313 U.S. 409 (1941). The *Morgan* cases hold that an agency head should not be required in litigation to explain all of the considerations that went into a decision that was the result of formal rulemaking or a quasi judicial proceeding. *Id.* at 421-22. Administrative decisions must be judged based on the administrative record or evidence adduced by the parties. The *Morgan* principle is not offended here because the media ban was not the result of any formal agency process. On the contrary, there was neither notice nor a hearing before the media ban went into effect. Accordingly, even if on remand Hammer sought to depose Attorney General Ashcroft—who, after all, chose to speak publicly about the rationale behind the media ban—such scrutiny would not upset "the integrity of the administrative process." *Id.*

I believe that in the rare circumstances where a prisoner submits evidence casting doubt on the legitimacy of the security rationale supposedly supporting a policy, he deserves to have the chance to create a full record to shed light on those circumstances, and ultimately, to have a trier of fact resolve disputes of fact. I stand by that holding, and accordingly, I dissent.

WOOD, *Circuit Judge*, dissenting. Although I agree with much of Judge Rovner's dissent, I write separately in order to highlight my own concerns with the majority's opinion. Briefly put, they are as follows: first, the record does not support certain key assumptions made in the majority's opinion; second,

and related to the first point, it was error to grant summary judgment in favor of the defendants without permitting the plaintiff, David Hammer, to develop the record properly; and third, the majority has erred by adopting a rule permitting wholesale censorship in prisons—one that goes much farther than anything the Supreme Court sanctioned in *Pell v. Procunier*, 417 U.S. 817 (1974), or *Saxbe v. Washington Post* Co., 417 U.S. 843 (1974).

First, we must look at the record. Central to the majority's analysis is the assumption that inmate "[c]orrespondence is unlimited; an inmate's letters to reporters are not subject to inspection or censorship." *Ante* at 3. In support of this proposition, the majority cites Bureau of Prisons ("BOP") Program Statement ("PS") 5265.11(17)(a) (July 9, 1999). It then goes on to say that "[p]hone calls with reporters are subject to [PS] 1480.05(7)(d), which provides that '[a] representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed.'" What the majority brushes over, however, is the fact that there is nothing in paragraph 7(d) of the Program Statement (or any other part of that Statement) that limits this restriction to information collected through telephone calls. In fact, materials in the record suggest strongly that the prohibition extends to all forms of communication. For example, the record includes a letter from Warden Lappin to a lawyer who published a news release that included statements that inmate Hammer made about other inmates. (Plaintiff's Appendix at A169.) The

Warden's letter rebukes the lawyer and informs him that 28 C.F.R. § 540.61(d) prohibits this publication. That regulation applies to all collection of information by the media, not just to telephone calls. *Id.* In a memorandum of December 22, 2000, from the Warden directly to Hammer, the Warden reprimands Hammer for providing information concerning other inmates "during a recent news media interview." (Plaintiff's Appendix at A171.) The memorandum says nothing about the form the interview took. Two weeks later, in response to Hammer's request for clarification, Warden Lappin replies "You are hereby ordered not to provide any information concerning other inmates during news media interviews, social calls, *or correspondence with the media*." (Plaintiff's Appendix at A172; emphasis added.)

At oral argument before this court, counsel for the governmental defendants did not endorse the narrow rule that the majority has postulated. To the contrary, counsel said that *all* mail sent by inmates in the Special Confinement Unit (where Hammer is incarcerated) must be given to prison officials unsealed for inspection before it is mailed. Although this might seem to conflict with PS 5265.11(17)(a), which provides that properly identified and labeled correspondence from an inmate not on restricted mail status to qualifying representatives of the news media "shall be sealed and forwarded without inspection, directly and promptly," that rule is not unqualified. Most importantly, mail from inmates on restricted special mail status is subject to inspection,

and PS 5265.11(17) is expressly made subject to the Program Statement on News Media Contacts—that is, to PS 1480.05. The record does not establish whether Hammer was on restricted mail status, but it indicates that he may have been. (It would not surprise me if everyone in the Special Confinement Unit were subject to additional restrictions.) Furthermore, it is still necessary to reconcile 28 C.F.R. § 540.61(d), PS 5265.11(17), and PS 1480.05(7)(d). It seems most consistent with all of these materials (and consistent with both Warden Lappin's interpretation and the government's representation) to conclude that if a prisoner wrote a letter to a representative of the media that conveyed information about a fellow inmate, the letter would be confiscated. Without the linchpin provided by its assumption that correspondence is free, the majority's rationale collapses.

This brings me to my second point—again one that Judge Rovner has also emphasized: Hammer was blocked completely from developing a record at the summary judgment stage. The government moved for summary judgment before the close of discovery and then refused to comply with Hammer's requests. This left Hammer with little or nothing on which to rely when he attempted to oppose the summary judgment motion. The majority here sets up a straw man, claiming that the only thing that would suffice would be direct depositions of former Attorney General John Ashcroft, former Director of the BOP Kathleen Hawk-Sawyer, and former Warden of the U.S. Penitentiary at Terre Haute Harley Lappin, in

which Hammer tried to unmask their "true" reason for the new rules. The majority is worried that such untrammeled discovery would be inconsistent with *United States v. Morgan*, 313 U.S. 409 (1941), and *PBGC v. LTV Corp.*, 496 U.S. 633 (1990). Its concerns are misplaced. First, it is a mistake to lump all three defendants into the same group. As the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), underscores, it is one thing to acknowledge that a high official has knowledge of a particular policy, or even approves of it personally; it is quite another to plead that the official was personally responsible for a violation of constitutional rights. Here, the record already includes the public statements—reproduced *ante* at 8-9—that former Attorney General Ashcroft made about the media ban. In my opinion, the district court could easily respect the policies animating *Morgan* and *LTV* simply by limiting to publicly available information (including whatever falls within the scope of the Freedom of Information Act) any further exploration of the Attorney General's position.

It is by no means unprecedented to seek the deposition of the Director of the BOP or the warden of a particular prison. Once again, the district court would be in a position to decide whether such a measure was necessary, or if alternatives (including production of documents or answers to interrogatories; perhaps even depositions upon written questions) would suffice. Hammer has a right to explore whether the media ban was based

upon legitimate penological concerns—in which case it is legal under the well-established standards of *Turner v. Safley*, 482 U.S. 78, 89 (1987)—or if it was instead designed to stifle speech because the authorities fear that the content will be unwelcome. The latter is, unfortunately, not beyond imagination. It is likely that the military authorities running the infamous Abu Ghraib prison would not have wanted the inmates talking to the media, either about their own experiences or those of their fellow prisoners (some of whom may have been too injured, or too intimidated, to speak for themselves). Closer to home, the sad but true fact is that abuse by prison guards or police has not been entirely abolished. One prisoner might want to write letters that are self-aggrandizing, just as the authorities feared, but another might want to alert the media to the fact that human rights abuses were occurring in a place like the Special Confinement Unit. Censorship of all avenues of communication—which, as I have said, is what this record shows—would be an all-too-effective way to prevent the public from ever learning about such problems.

That leads me to the final point, which is the one that Judge Rovner has emphasized: the First Amendment implications of the media ban. While I certainly agree with her that there is a potential First Amendment problem here, I see this case as a textbook example of the wisdom of the rule of constitutional avoidance. It seems elementary to me that before this court, or any court, should reach an important constitutional question, the record should

be developed properly and we should know what we are talking about. That has not happened in this case. The majority has filled in the gaps with speculation, both about possible loopholes that might make written correspondence an adequate outlet for prisoners despite the media rule, and about possible penological justifications for the rule. This is not the way that we should approach a question as important as the balance between First Amendment rights of prisoners—which *Turner* recognizes are not forfeited entirely—and the critical job of prison officials to ensure security and safety within the prison walls. It is worth noting, however, that neither *Pell* nor *Washington Post* approved a total ban on contact with the media. To the contrary, *Pell* relied on the existence of "alternative methods of communication that are open to prison inmates," 417 U.S. at 504, and *Washington Post* made clear that "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there," 417 U.S. at 518. *Washington Post* mentioned specifically the fact that "[o]utgoing correspondence from inmates to press representatives is neither censored nor inspected." *Id.* To the extent that the majority's opinion has swept away the need to show adequate alternative avenues for communication, it has, in my view, overstepped an important boundary that the Court has drawn.

As the original panel opinion did, I would therefore reverse the grant of summary judgment and remand this case to the district court for further proceedings,

along the lines I have outlined here. I therefore respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID PAUL HAMMER,
Plaintiff-Appellant,

v.

JOHN D. ASHCROFT, et al.,
Defendants-Appellees.
No. 06-1750.

Argued Nov. 26, 2007.
Decided Jan. 15, 2008.
Rehearing En Banc Granted,
Opinion Vacated Aug. 19, 2008.*

ROVNER, Circuit Judge.

David Hammer, a federal prisoner on death row, sued various Bureau of Prisons ("BOP") officials alleging that they violated his First Amendment and equal protection rights by implementing and enforcing a policy that prevents him from giving face-to-face interviews with the media and from talking with the media about other inmates. The current defendants-the former Attorney General of the United States, John Ashcroft; a former BOP Director, Kathleen Hawk-Sawyer; and former wardens of the federal prison in Terre Haute, Indiana, Harley Lappin and Keith Olson-moved for

* Judges Flaum, Williams and Tinder did not participate.

summary judgment, arguing that the challenged policy is rationally related to legitimate penological interests. The district court granted the defendants' motion, and Hammer appeals. Because we conclude that Hammer raised a genuine issue of fact as to whether the defendants' proffered justification for the policy banning face-to-face interviews is pretextual, we reverse and remand.

I. Background

In July 1999 the BOP opened the Special Confinement Unit ("SCU") at the federal prison in Terre Haute, Indiana, to house male inmates sentenced to death by the federal courts. The SCU also houses inmates who are not under a death sentence, but who are considered to be on "administrative detention status." Hammer-who was under a federal death sentence for killing his cellmate-was among the first inmates transferred to the SCU.[1]

Between August and December 1999, Hammer gave three face-to-face interviews with members of the media in the SCU's non-contact visiting area. No

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[1] Hammer's death sentence has been vacated, *see United States v. Hammer*, 404 F. Supp. 2d 676 (M.D. Pa. 2005)-a decision the government is challenging in the Third Circuit Court of Appeals, *see Hammer v. United States*, No. 06-9001, 128 S. Ct. 43, 169 L. Ed.2d 41. Although Hammer is no longer under a death sentence, Hammer's counsel informed us during oral argument-and the appellees do not dispute-that he is still housed on death row at the SCU and is still subject to the challenged policy.

security problems arose as a result of these interviews. But in late December 2000, Lappin ordered Hammer not to provide information to members of the media about other inmates. When Hammer asked Lappin for clarification, he stated that Hammer was "prohibited from disclosing to a media representative *any* information about another inmate through any manner of communication (oral, written, etc.)." Just over a month later, the BOP disciplined Hammer for providing information about a fellow death row inmate to a reporter. Lappin did not, however, generally prohibit Hammer from giving face-to-face interviews.

That situation changed a few months later. In March 2000, CBS aired a national broadcast of "60 Minutes" featuring an interview with Timothy McVeigh. At that time McVeigh was housed at the SCU awaiting execution for his role in the 1995 bombing of the Alfred P. Murrah federal building in Oklahoma City. Following this interview, U.S. Senator Byron Dorgan wrote to BOP Director Hawk-Sawyer on March 14, 2000, criticizing the BOP for allowing the McVeigh interview and demanding that the BOP prohibit similar interviews with other death row inmates. The published account of this criticism described Dorgan's view of the value of such interviews:

> The American people have a right to expect that the incarceration of a convicted killer will not only remove him physically from society, but will also prevent him from further intrusion in our lives through television

interviews and from using those forums to advance his agenda of violence.

Soon thereafter Lappin (then the SCU warden) denied every media request for a face-to-face interview with Hammer. When Hammer filed an administrative grievance to protest these denials, Lappin informed him that the procedures for granting interviews "have evolved" since the SCU opened and that requests for in-person media interviews are evaluated on "a case-by-case basis."

The policy on face-to-face interviews evolved further one month later. On April 12, 2001, Ashcroft and Hawk-Sawyer gave a press conference during which they announced a change from the case-by-case policy to a blanket policy preventing SCU inmates from having face-to-face interviews with members of the media on any subject at any time. The policy allows SCU inmates to speak to the media only by telephone during their ordinary 15-minute daily allotment of telephone time. In announcing this policy, Ashcroft explained that it is designed to prevent murderers from, in his view, altering our culture by glamorizing violence:

> I am aware that several media outlets have requested access to interview inmate McVeigh. As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as Attorney General of the United States, I do not want anyone to be able to purchase access

to the podium of America with the blood of 168 innocent victims.

* * *

I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly.

Hawk-Sawyer announced that the 15-minute telephone limitation "will become the policy for the [SCU] in general."

Three days after the press conference, Lappin signed Institution Supplement 1480.05A ("the media policy"), which states that "[t]o maintain safety, security and the good order of the SCU, in-person interviews (including video-recorded interviews) will not be permitted." To gain permission for a 15-minute telephone interview under the new media policy, members of the press must agree that they will not ask an SCU inmate any questions about other federal or state prisoners. And members of the press must agree not to publish any information that an SCU inmate volunteers about other prisoners. All parties agree that the media policy does not apply to all SCU inmates-it applies only to those SCU inmates who have been sentenced to the death penalty.

Hammer sued the defendants under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), alleging that the media policy's ban on in-person interviews and discussions about other inmates violated his First Amendment and equal protection rights. The district court dismissed the

complaint under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b)(1), but we reversed, finding that Hammer's allegations-specifically, that the defendants implemented the media policy to prevent death row inmates from speaking publicly rather than to further security concerns-stated a claim, *see Hammer v. Ashcroft, et al.,* 42 Fed. Appx. 861, 863 (7th Cir. 2002).

After we remanded the case, Hammer moved three times for the court to recruit counsel on his behalf. The district court denied each motion. Hammer also filed three requests for discovery, but instead of responding to those requests, the defendants moved for summary judgment a full month before the close of discovery. Only after filing their summary judgment motion did the defendants respond to Hammer's discovery requests by objecting to them all. Hammer filed a motion for a continuance under Federal Rule of Civil Procedure 56(f), arguing that he needed additional time to procure discovery from the defendants. He also filed a brief opposing the motion for summary judgment. The court entered an order granting the continuance "to the extent that his filings in this action ... shall be deemed to have been timely made," but it denied Hammer any extension of time to conduct further discovery.

In support of the defendants' motion for summary judgment, Lappin submitted a declaration purporting to justify the SCU's media policy. He explained that broadcasting face-to-face interviews of inmates can create "jailhouse celebrities," giving them heightened status among the inmates and

leading to security breaches. He also explained that it was necessary to restrict inmates from discussing other inmates with the media to prevent privacy breaches or "real or imagined slights, insults or provocations" that could inflame tensions in the SCU. In his response, Hammer argued that Lappin's articulated security rationale for the ban on face-to-face interviews was "a guise" to cover up "the real reason" behind the ban-anger over the McVeigh interview and the resulting outrage over death row inmates speaking to a national audience. The court granted the defendants' motion for summary judgment, stating that the media policy is reasonably related to legitimate penological interests.

II. Analysis

On appeal Hammer argues that the SCU's media policy preventing death row inmates from giving face-to-face interviews with the media violates his equal protection, First Amendment, and procedural due process rights. Specifically, he argues that the media policy treats death row inmates differently from all other federal inmates based on an untested assumption that giving death row inmates access to the media poses a categorically heightened security risk. Hammer also asserts that he submitted evidence sufficient to show that the media policy was passed for the impermissible reason of preventing death row inmates from speaking publicly, and not to further security interests. He also argues that the manner in which the BOP adopted the media policy deprived him of due process. Finally, Hammer challenges the district court's denial of his three

motions for counsel and his Rule 56(f) motion for a continuance.

A. Constitutional Claims

We review *de novo* the district court's grant of summary judgment for the defendants on Hammer's constitutional challenges to the media policy. *See Steen v. Myers,* 486 F.3d 1017, 1021 (7th Cir. 2007). Inmates retain constitutional rights that are consistent with incarceration; those rights include access to the media. *See Turner v. Safley,* 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Pell v. Procunier,* 417 U.S. 817, 827-28, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974). But recognizing the deference owed to the administrative judgment of prison officials, the Supreme Court has held that a prison regulation infringing on an inmate's constitutional rights is valid if "it is reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89, 107 S. Ct. 2254. Accordingly, a prison regulation that restricts an inmate's access to the media will be upheld if there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (quotation marks omitted). Other relevant factors include whether the regulation leaves open alternative means of exercising the right; the impact accommodation would have on other inmates, guards, and prison resources; and whether there are obvious, easy alternatives to the restriction. *Id.* at 89-90, 107 S. Ct. 2254; *see also Lindell v. Frank,* 377 F.3d 655, 657 (7th Cir. 2004).

Hammer argues that we should apply strict scrutiny to his equal protection claim, rather than the *Turner* analysis, because he maintains that *Turner* applies only to policies that affect all inmates within a prison equally or that apply temporarily to individual inmates in response to a disciplinary infraction. Hammer argues that strict scrutiny should apply here because the media policy arbitrarily deprives death row inmates of First Amendment freedoms that other federal prisoners enjoy-namely, face-to-face media access. But the Supreme Court has held that the *Turner* analysis "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington v. Harper,* 494 U.S. 210, 224, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990); *see also Russell v. Richards,* 384 F.3d 444, 447 (7th Cir. 2004). Post-*Turner,* the Supreme Court applies strict scrutiny only to prison regulations involving suspect classifications such as race. *See, e.g., Johnson v. California,* 543 U.S. 499, 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005). Federal inmates on death row are not a suspect class. *Cf. Pryor v. Brennan,* 914 F.2d 921, 923 (7th Cir. 1990). Accordingly, courts have declined to apply heightened scrutiny in cases involving equal protection challenges to prison regulations that implicate First Amendment rights, *see, e.g., Williams v. Lane,* 851 F.2d 867, 881 (7th Cir. 1988); *Taylor v. Johnson,* 257 F.3d 470, 474 (5th Cir. 2001); *Morrison v. Garraghty,* 239 F.3d 648, 654-55 (4th Cir. 2001), even where the regulations distinguish among groups of inmates within a prison, *see DeHart v. Horn,* 227 F.3d 47, 61 (3d Cir. 2000);

Benjamin v. Coughlin, 905 F.2d 571, 575 (2d Cir. 1990). Thus we view Hammer's equal protection and First Amendment claims through the *Turner* lens.

Turning then to the first prong of the *Turner* analysis and Hammer's First Amendment claim, we ask whether a valid, rational connection exists between the media ban on face-to-face interviews and the cited security interest. *See Turner,* 482 U.S. at 89, 107 S. Ct. 2254. No such connection exists if the purpose of the policy is to suppress the content of the restricted message. *See id.* at 90, 107 S. Ct. 2254. And the penological interest that the prison officials invoke in court to justify the restriction must have actually motivated them at the time they enacted or enforced the restriction; the invoked interests fail under *Turner* if they are a pretext for an illegitimate, content-specific motivation. *See Salahuddin v. Goord,* 467 F.3d 263, 276-77 (2d Cir. 2006) (holding that prison officials must show that they "actually had, not just could have had, a legitimate reason for burdening protected activity" to survive summary judgment); *Abu-Jamal v. Price,* 154 F.3d 128, 134 (3d Cir. 1998) (noting that a prison rule is "not content neutral as required by *Turner*" if it is enforced at least in part due to public pressure rather than security concerns); *Quinn v. Nix,* 983 F.2d 115, 118 (8th Cir. 1993) (stating that "[p]rison officials are not entitled to the deference described in *Turner* ... if their actions are not actually motivated by legitimate penological interests at the time they act."); *Walker v. Sumner,* 917 F.2d 382, 386-87 (9th Cir. 1990) (holding that where a prisoner alleges that a policy is enforced for a "dubious purpose" officials

must demonstrate that the asserted penological interests "are the actual bases for their policies"); *Baraldini v. Thornburgh*, 884 F.2d 615, 620 (D.C. Cir. 1989) (noting that "[a] reviewing court must always be careful to make certain that prison administrators are not pretextually using alleged concerns in order to punish an inmate for his or her political or other views.").

Here, Hammer submitted evidence suggesting that the driving force behind the ban on face-to-face interviews was not a security concern, but rather outrage over McVeigh's message and a desire to prevent other death row inmates from expressing their views about themselves or their fates and thereby influencing "our culture." For example, without any concerns about security breaches Lappin allowed Hammer face-to-face media interviews until the McVeigh interview aired; after that (and after a senator's written protest to the BOP about such broadcasts) Lappin denied all media requests for face-to-face interviews with Hammer. Most significantly, in unveiling the blanket restriction on face-to-face interviews with death row inmates, Ashcroft-with Hawk-Sawyer at his side-explained that he wanted to deny such inmates a platform from which they could spread their "irresponsible glamorization of a culture of violence." This is evidence from which a jury could conclude that when Ashcroft's subordinate Lappin implemented the restriction at the SCU just three days later, the defendants desired to control a disfavored message rather than to secure the SCU.

The defendants argue that this evidence amounts to nothing more than "a coincidence of timing." But the evidence is more than just timing. Ashcroft explained that his distaste for the content of interviews given by death row inmates was the reason for the policy. That is direct evidence of the actual motivation, and it creates a genuine issue of material fact as to whether Lappin was motivated by a desire to prohibit a disagreeable viewpoint or to advance prison security.

The defendants also argue that we must defer to Lappin's judgment that the challenged policy is needed to combat the problem of jailhouse celebrities. But in reviewing a grant of summary judgment we must be careful to distinguish between matters of prison administration-on which we give substantial deference to prison officials' professional judgment-and matters of disputed fact on issues like motivation-on which we draw inferences in favor of the non-moving party. *See Beard v. Banks,* 548 U.S. 521, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697 (2006). If an inmate submits evidence showing that the penological interests invoked by prison authorities are pretextual, the policy is not neutral and fails under *Turner. See Abu-Jamal,* 154 F.3d at 134. Hammer submitted evidence from which a reasonable jury could conclude that the media policy was implemented and is now enforced not because of safety concerns, but rather in response to public pressure to prevent death row inmates from voicing their views publicly. Accordingly, summary judgment is inappropriate on Hammer's First Amendment challenge to the ban on face-to-face

interviews based on the first *Turner* factor. *See Salahuddin,* 467 F.3d at 276-77.

Summary judgment on the First Amendment claim was also inappropriate as to two other *Turner* factors because Hammer has cast doubt on whether the media policy leaves open sufficient alternate routes of access to the media and whether there are reasonable alternatives to the ban on face-to-face interviews. *See Turner,* 482 U.S. at 90, 107 S. Ct. 2254. For example, Lappin's justification for the ban on face-to-face interviews is that the *broadcast* of inmate interviews creates the risk of jailhouse celebrity. The government has not explained why, then, the prison needs to ban face-to-face interviews that are not recorded or broadcast. Moreover, there is a question of material fact whether the ban on discussing other inmates with the media allows Hammer an alternate route for discussing his criminal case. Hammer's goal is to discuss his criminal case (which involves inmate witnesses) with members of the press to highlight his disagreement with the prosecution. But he is subject to discipline if he engages in those discussions. Thus there is a question of material fact as to whether the policy leaves open *any* meaningful way for Hammer to access the media to discuss his case. *Cf. Pell,* 417 U.S. at 827-28, 94 S. Ct. 2800.

Turning to Hammer's equal protection claim, we note that the district court gave this claim short shrift, stating only that the media policy applies equally to all inmates housed in the SCU. But this ignores Hammer's evidence that the media policy applies only to SCU inmates under a death sentence,

a fact that the defendants do not dispute on appeal. And Hammer's evidence of pretext also casts doubt on whether the defendants had a valid interest in treating death row inmates differently from all other federal inmates. The equal protection clause prohibits the government from making distinctions among groups of speakers based on the content of their speech. *See, e.g., Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). Here, Ashcroft said that his concern about the "glamorization of violence" in American culture shaped the BOP's approach to the SCU-specific ban on death row inmates giving face-to-face interviews. A reasonable jury could thus conclude that death row inmates are treated differently not because they are disproportionately likely to become jailhouse celebrities or inflame tensions with other inmates, but because the policy makers believed that death row inmates are disproportionately likely to promote a "glamorization of violence." Accordingly, the defendants are not entitled to summary judgment on Hammer's equal protection claim.

The district court did not address what Hammer now argues is a claim that the defendants violated his due process rights by adopting the media policy without offering him notice or the opportunity to comment. But the court did not address this claim because Hammer did not make it; nothing in his complaint or opposition to summary judgment would have put the defendants or the court on notice that he objected to the process through which the policy was adopted. Because Hammer's purported due process claim is outside the scope of the court's grant

of summary judgment for the defendants, we need not address it here.

We note that it can be an easy thing for an inmate to allege that prison officials are lying about the rationale behind a prison restriction; it is only because Hammer has backed up his allegations with admissible evidence from which a reasonable jury could infer that an illegitimate reason lies behind the interview ban that his First Amendment and equal protection claims survive summary judgment.

B. Personal Involvement

The district court granted summary judgment for Ashcroft and Hawk-Sawyer because, in its view, they had no personal involvement in the events underlying the allegations. A supervisory defendant is personally involved in and liable for a constitutional violation if he "create[s] a custom or policy fostering the violation or allow[s] the custom or policy to continue after learning of it." *Thomas v. Ashcroft,* 470 F.3d 491, 496-97 (2d Cir. 2006). Ashcroft's and Hawk-Sawyer's participation in the press conference in which they called for the BOP ban on face-to-face interviews raises a triable issue of whether they fostered the ban for the purpose of suppressing expression. *See Whitford v. Boglino,* 63 F.3d 527, 531 (7th Cir. 1995). Thus summary judgment on the basis of their non-involvement was unwarranted.

Before addressing Hammer's procedural challenges to the district court's decision, we note two issues that the district court may address on remand. Hammer has sued the defendants in their

individual and official capacities for damages, and for injunctive and declaratory relief. The defendants may be entitled to qualified immunity from damages, but given the unresolved issues of fact, we leave that determination to the district court in the first instance. Hammer's claim for injunctive relief against the defendants in their individual capacities is now moot because none of the defendants currently hold the positions in which they were sued. But pursuant to Federal Rule of Appellate Procedure 43(c)(2) and Federal Rule of Civil Procedure 25(d), the district court should substitute the current officeholders for the official-capacity claims and consider which of them are proper defendants for injunctive relief under *Ex Parte Young*, 209 U.S. 123, 157, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (requiring a "special relation" between the public official sued and the challenged rule).

C. Denial of Motions for Counsel and for a Continuance

Hammer also argues that the district court erroneously denied his three motions to recruit counsel and his Rule 56(f) motion for a continuance. We review the district court's rulings on these motions for abuse of discretion. *See Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006); *Davis v. G.N. Mort. Co.*, 396 F.3d 869, 885 (7th Cir. 2005). In resolving a motion for the recruitment of counsel, the district court must consider both the complexity of the case and the *pro se* plaintiff's ability to litigate it himself. *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). The court must analyze the plaintiff's capabilities in light of the challenges specific to his

case, including "the tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial." *Id.* at 655. In reviewing a court's decision to deny a motion for counsel, we must ensure that the court meaningfully engaged in the correct analysis, and did not render a decision arbitrarily. *Id.* at 658, 660.

Here, the district court's three orders denying Hammer's requests for counsel do not demonstrate that the court meaningfully considered the complexity of Hammer's claims. Its first order is silent regarding the difficulty of his case. The second two orders state that Hammer "has demonstrated familiarity with his claims and the ability to present them, because the issues presented by his claims are not complex, and because this does not appear to be a case in which the presence of counsel would make a difference in the outcome." But this is nothing more than a restatement of the applicable legal standard, without any reasoning showing that the court actually considered the standard in light of the particulars of Hammer's case. *See id.* at 660.

But we will reverse the district court's decision to deny counsel only on a showing of prejudice, *see id.* at 659, which leads us to Hammer's Rule 56(f) motion for a continuance. Hammer asked for more time to conduct discovery because the defendants moved for summary judgment before the close of discovery and then objected to all of his discovery requests. Because Hammer filed his opposition to summary judgment before the court ruled on his motion, it concluded that he did not need further

time for discovery. But the fact that Hammer filed his response before waiting to see if the court would grant the continuance shows only that he made the best of what he had, not that he had a fair opportunity to avail himself of discovery. And nothing in the court's order denying the continuance suggests that it considered the impact that the defendants' premature summary judgment motion had on Hammer's ability to obtain the discovery necessary to defend against the motion.

The appellees now defend the district court's denial of the continuance on the ground that Hammer did not specify what documents he needed time to procure. But that is precisely the kind of failure that could have been cured had the court granted his motion for counsel. The appellees cannot have it both ways-they cannot argue that Hammer has the ability to litigate his own claims and then fault him when he fails to do so with the sophistication of an attorney. We thus conclude that the denial of counsel prejudiced Hammer, and, especially in light of Hammer's *pro se* status, that the court abused its discretion in denying his Rule 56(f) motion for a continuance.

For the reasons set forth above, the district court's decision is REVERSED and REMANDED for further proceedings.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

DAVID PAUL HAMMER,

Plaintiff,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,

Defendants.

No. IP 01-558-C-T/G.

Feb. 23, 2006.

TINDER, J.

This cause is before the court on the amended complaint of plaintiff David Paul Hammer, on the defendants' answer, and on the defendants' motion for summary judgment.

Whereupon the court, having considered the pleadings, the motion for summary judgment, the response thereto and the defendants' reply, and being duly advised, now finds that the motion for summary judgment must be granted. This conclusion rests on the following facts and circumstances:

1. As used in this Entry, "Hammer" refers to the plaintiff, David Paul Hammer, "USPTH" refers to the United States Penitentiary at Terre Haute, Indiana, "BOP" refers to the Federal Bureau of Prisons, "Attorney General Ashcroft" refers to former

United States Attorney General John Ashcroft, "Director Lappin" or "Warden Lappin" refers to BOP Director Harley Lappin, "Director Sawyer-Hawk" refers to former BOP Director Kathleen Sawyer-Hawk, and "Warden Olson" refers to USPTH Warden Keith Olson.

2. As noted, the defendants seek resolution of Hammer's claims through the entry of summary judgment.

> a. The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Note to 1963 Amendment of FED. R. CIV. P. 56(e) (quoted in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). "Summary Judgment is not appropriate 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party'." In a motion for summary judgment, the court "may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (citations omitted). "Rather, '[t]he court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.'" *Id.* (quoting *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994)). If a reasonable jury could return a

verdict in favor the nonmovant, summary judgment should not be granted. *Id.* (citation omitted).

b. A court will grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Scott v. Edinburg,* 346 F.3d 752, 755 (7th Cir. 2003) (quoting FED. R. CIV. P. 56(c) and citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The court must "construe all facts in a light most favorable to ... the party opposing summary judgment, and ... draw all reasonable inferences in his favor." *McGreal v. Ostrov,* 368 F.3d 657, 672 (7th Cir. 2004) (citation omitted). "'In the light most favorable' simply means that summary judgment is not appropriate if the court must make 'a choice of inferences.'" *Draghi v. County of Cook,* 184 F.3d 689, 691 (7th Cir. 1999) (quoting *Smith v. Severn,* 129 F.3d 419, 425 (7th Cir. 1997)). However, the nonmoving party bears the burden of coming forward with specific facts from the record which show a genuine issue of material fact. *Morfin v. City of E. Chi.,* 349 F.3d 989, 997 (7th Cir. 2003) (citation omitted). "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be

entered." *Liberles v. County of Cook*, 709 F.3d 1122, 1126 (7th Cir. 1983).

3. "Relief from misconduct by federal agents may be obtained either by a suit against the agent for a constitutional tort under the theory set forth in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), or by a suit against the United States under the Federal Tort Claims Act [FTCA] ... which permits claims based upon misconduct which is tortious under state law. 28 U.S.C. §§ 1346(6), 2680." *Sisk v. United States,* 756 F.2d 497, 500 n.4 (7th Cir. 1985). Hammer has chosen the Bivens route.

a. Claims asserted under a Bivens theory are brought pursuant to subject matter jurisdiction conferred by 28 U.S.C. § 1331, which provides that "[t]he District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

b. A prerequisite to maintaining an action under § 1331 is that the plaintiff "must allege a violation of the United States Constitution or a federal statute." *Goulding v. Feinglass,* 811 F.2d 1099, 1102 (7th Cir. 1987), *cert. denied*, 482 U.S. 929, 107 S. Ct. 3215, 96 L. Ed. 2d 701 (1987).

c. Bivens "authorizes the filing of constitutional tort suits against federal officers in much the same way that 42 U.S.C. § 1983 authorizes such suits against

state officers." *King v. Federal Bureau of Prisons,* 415 F.3d 634, 636 (7th Cir. 2005). Thus, one feature of a Bivens action is that the plaintiff must allege that the individual defendants were personally involved in the violation of his constitutional rights. *See Barbera v. Smith,* 836 F.2d 96, 99 (2d Cir. 1987), *cert. denied sub nom. Barbera v. Schlessinger,* 489 U.S. 1065, 109 S. Ct. 1338, 103 L. Ed. 2d 808 (1989).

4. Hammer's claims which survive prior rulings and certain voluntary dismissals are that the defendants violated his First Amendment rights by denying and restricting his access to the news media based on the content of his message and his status as a federal death-row inmate. He alleges that between March 2000 and April 2001 a number of news organizations wished to conduct face-to-face or video-conference interviews with him, but that Warden Lappin denied every one of his requests to participate in the interviews. In addition, Hammer alleges that Warden Lappin unconstitutionally restricted Hammer's ability to communicate with the media via telephone or mail correspondence. Hammer seeks compensatory and punitive damages and injunctive relief.

5. Several general principles guide the court's consideration of the free speech and association claims presented. Among these principles are those on which the Court of Appeals relied in finding that the dismissal of the present action pursuant to 28 U.S.C. § 1915A(b) was premature. *Hammer v.*

Ashcroft, 2002 WL 1732580 (7th Cir. 2002) (unpublished).

a. Lawful "incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (citing *Price v. Johnston,* 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948)).

b. Nonetheless, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish,* 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).

c. Inmates retain First Amendment rights that are consistent with incarceration, and prison restrictions limiting or interfering with those rights must reasonably relate to legitimate penological interests. *Turner v. Safley,* 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Rowe v. Shake,* 196 F.3d 778, 782 (7th Cir. 1999).

d. While inmates' free-speech rights include access to the media, inmates do not have a right to face-to-face interviews so long as other avenues of communication are open to them, and regulations denying face-to-face interviews are applied in a neutral, equal manner without regard to content. *See Pell v. Procunier,* 417 U.S. 817, 827-28 (1974);

Rowe, 196 F.3d at 782; *Abu-Jamal v. Price*, 154 F.3d 128, 134 (3d Cir.1998). Prison officials are given deference in establishing regulations and in determining appropriate restrictions, and a court will not second-guess regulations or practices that serve legitimate penological interests. *Turner*, 482 U.S. at 89. Additionally, as an incident of their incarceration, prisoners lack the same freedom to criticize they would enjoy on the outside. *Gibbs v. King*, 779 F.2d 1040 (5th Cir.), *cert. denied*, 476 U.S. 1117, 106 S. Ct. 1975, 90 L. Ed. 2d 659 (1986).

e. The Supreme Court has delineated four factors for determining whether a specific regulation or practice serves a legitimate penological interest. *Turner*, 482 U.S. at 89-90. The primary factor is whether a valid, rational connection exists between the restriction and a legitimate interest. *Id.* A restriction on speech that fails to meet this connection fails under *Turner*. *See Shaw v. Murphy*, 532 U.S. 223, 229-30, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). The other factors relevant in determining a restriction's reasonableness include whether the inmate has alternative means of exercising the right; the impact accommodation of the asserted right would have on guards, other inmates, and prison resources; and the absence of a reasonable alternative to the regulation or practice. *Turner*, 482 U.S. at 90.

f. In determining whether a prison regulation is "'reasonably related to legitimate penological interests,'" a prisoner "must overcome the presumption that the prison officials acted within their 'broad discretion.'" *Shaw v. Murphy,* 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). "The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton v. Bazzetta*, 532 U.S. 126, 132 (2003).

6. As to each of the various specifications of improper action, whether it be the promulgation or implementation of BOP policies or actions assertedly taken outside the bounds of such policies, Attorney General Ashcroft and Director Hawk-Sawyer were not personally involved. The consequence of this is that these defendants are not liable to Hammer for any of those actions and they are entitled to the entry of summary judgment as to the claims against them.

7. Warden Lappin was Warden of the USPTH from October 25, 1998, until July of 2001. As Warden, Lappin had overall responsibility of all functions of the institution and in that role he planned, directed and coordinated institution programs covering a broad range of diverse issues related to complex institution safety and security requirements. Warden Olson was Warden of the USPTH from August 26, 2001, until September 30, 2004.

8. On July 13, 1999, the Special Confinement Unit ("SCU") was activated at the USPTH. The SCU is the assigned housing unit for male prisoners under federal sentences of death. While at the USPTH, Hammer has been assigned to the SCU.

9. The BOP promulgates Program Statements that contain the internal operating policies and procedures of the Bureau in order to provide direction to Bureau personnel in the operation of the federal prison systems. Following the activation of the SCU, numerous institution supplements were reviewed to ascertain if modifications were needed to specifically address the special and unique needs of the SCU. An institution supplement is a statement of procedure which is required in order to given direction to operations of a BOP facility because of local conditions. Institution supplements are reviewed by institution staff and signed by the Warden. Because the USPTH is the only federal facility with such a unit, these policies are specific to the USPTH. Management of the SCU at the USPTH requires consideration of factors not present, or not present to the same degree, in other housing units of the USPTH or other units of other prisons operated by the BOP. The SCU is unique, as is its inmate population. In considering the supplement to Program Statement 1480.05, prison personnel (including Warden Lappin) intended to balance the interests of the inmate and the journalist along with the interests of the BOP with respect to its responsibility of maintaining security and good order at the institution. Additionally, it was the intent of those involved with implementing the Supplement to

safeguard the safety and the rights (including privacy rights) of institution staff and of the inmate population. These were legitimate concerns in the specific environment which was being administered. There was the potential for inmates to be perceived as "jail celebrities," which could disrupt the orderly operation of the prison by undermining prison security. Additionally, the right of privacy of other inmates was a consideration. In a correctional setting, slights, insults or provocations, real or imagined, can result in inmate-on-inmate violence and thus can have dire consequences for inmates, penitentiary staff, and the public at large. The result of this effort was the adoption of Institution Supplement THA 1480.05A. [1]

The procedures implemented as the result of these concerns were determined to be the least restrictive method of protecting the various interests involved-the interest of the individual inmate, the interests of the inmate as a whole, and the interests of the public as a whole. Although Institution Supplement THA 1480.05A restricts Hammer's access to face-to-face interviews with members of the media, it does so in a manner fully in accord with the standard established in *Turner*. That is, the restriction contained in Institution Supplement THA 1480.05A is reasonably related to legitimate penological interests. Hammer has not shown

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[1] Institution Supplement THA 1480.05A was replaced with Institution Supplement THA 1480.05B in January 2003. For the purpose of the present record, no substantive changes were made to the section addressing media interviews for SCU inmates.

otherwise, even though it is his burden to do so, *Overton v. Bazzetta*, 532 U.S. 126, 132 (2003), and the evidentiary record shows in every respect that the regulation adopted by Warden Lappin via Institution Supplement THA 1480.05A withstands Hammer's constitutional challenge. Not only is the restriction reasonably related to legitimate penological interests, but the restriction is applied in a neutral manner without regard to content. The restriction is applied equally among inmates housed in the SCU. Hammer and other inmates assigned to the SCU may contact media representatives through general and special mail, as well as through monitored and unmonitored telephone calls, giving these inmates an alternative means of exercising the right. Accommodating the unfettered right Hammer asserts would have a disruptive impact on the operation of the prison. Institution Supplement THA 1480.05A sets forth restrictions on inmate content with the media only in areas reasonably deemed proper for the purpose of operating the prison. Although Warden Lappin denied several requests by media representatives for personal interviews with Hammer, Hammer and other inmates assigned to the SCU have meaningful access to the media, and Institution Supplement THA 1480.05A does not infringe on the constitutional guarantee of that access. *See Johnson v. Stephan,* 6 F.3d 691, 692 (10th Cir. 1993) (prisoner's First Amendment rights not violated when prison officials denied face-to-face interview with prisoner since alternative means of communication were available); *Mitford v. Pickett,* 363 F. Supp. 975, 978 (E.D. Ill. 1973) (prison regulations limiting personal interviews of inmates

by the press is an internal affair of prison and does not violate the First Amendment where inmates and the press have ample opportunity to communicate by mail). The fact that Hammer does not assess his own history of communication with the media as anything other than benign is not significant, *Lujan v. National Wildlife Federation,* 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) ("[t]he object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit"), just as the fact that the restrictions imposed in Institution Supplement THA 1480.05A were not always in place is not significant, for inmates acquire no interest in unchanging conditions of their confinement. *Meachum v. Fano,* 427 U.S. 215, 225, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) (transfer of inmates to prison with more burdensome conditions of confinement not a violation of due process). The Supreme Court has stated that content-based speech restrictions are "neutral" so long as distinctions are drawn "solely on the basis of their potential implications for prison security." *Thornburgh v. Abbott,* 490 U.S. 401, 415-16, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). Thus, while the government here is proscribing the content of the speech of SCU inmates, this is "neutral" for purposes of this analysis. *See also Giano v. Senkowski,* 54 F.3d 1050, 1055 (2d Cir. 1995) (discussing neutrality under *Turner*).

10. Warden Olson was not involved in the drafting or implementation of Institution Supplement 1480.05A in any respect. He did approve the replacement document in January 2003,

this being Institution Supplement THA 1480.05B. As noted, however, no substantive changes were made to the section addressing media interviews for SCU inmates.

11. Hammer's case is built around the view that he is entitled to participate in interviews without regard to the management and control of the SCU. This ignores the realities of the SCU, the reason for its existence, and the legitimate-even the paramount-interests of prison authorities in carrying out the difficult task of operating the SCU.[2] This task warrants deference from the courts, which must be sensitive to their expert judgment and mindful that the judiciary is "'ill equipped' to deal with the difficult and delicate problems of prison management." *Thornburgh v. Abbott,* 490 U.S. 401, 407-08, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989). At the same time, that deference "must be schooled, not absolute." *Campbell v. Miller,* 787 F.2d 217, 227 n.17 (7th Cir.), cert. denied, 479 U.S. 1019, 107 S. Ct. 673, 93 L. Ed. 2d 724 (1986). The fact that initial responsibility for the prison is vested in prison administrators "does not mean that constitutional rights are not to be scrupulously observed." Bell, 441 U.S. at 562. For the reasons explained above, prison authorities-including the defendants-have not overstepped the constitutional limits, and the regulation they have crafted is not, as Hammer characterizes it, a simple limit on speech they would find offensive. In the specific environment in which

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[2] As Hammer himself concedes, he is on death row for having murdered a fellow inmate at a federal prison in Pennsylvania.

Hammer finds himself, the regulation is a compelling adjunct to the sound management of the SCU-amply passing the constitutional challenge pressed in this case. *See, e.g., Hewitt v. Helms,* 459 U.S. 460, 473, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983) ("[t]he safety of the institution's guards and inmates is perhaps the fundamental responsibility of the prison administration"); *Pell v. Procunier,* 417 U.S. 817, 823, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974) (security is "central to all other corrections goals").

12. Claims such as those presented in this case must be considered in light of the special environment of a prison, where administrators "must be accorded wide-ranging deference in the ... execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier,* 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted). Nonetheless, "[f]ederal courts must take cognizance of the valid constitutional claims of prison inmates." *Babcock v. White,* 102 F.3d 267, 275 (7th Cir. 1996) (quoting *Turner v. Safley,* 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)). Hammer has not identified a genuine issue of material fact as to his claims against the defendants. Their motion for summary judgment is therefore granted.

Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID PAUL HAMMER,
Plaintiff-Appellant,

v.

JOHN D. ASHCROFT,
Attorney General of the United States, et al.,
Defendants-Appellees.

No. 01-2898.
Submitted July 24, 2002.[1]
Decided July 25, 2002.

Before BAUER, RIPPLE, MANION, Circuit Judges.

ORDER

Federal death-row inmate David Paul Hammer brought this lawsuit under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), alleging that the defendants violated his First Amendment rights by denying and restricting his access to the

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[1] Appellees notified this court that they were never served with process in the district court and would not be participating in this appeal, which has been submitted without a brief from them. After examining the appellant's brief and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the appellant's brief and the record.

news media. The defendants are Attorney General John D. Ashcroft, Warden Harley G. Lappin, and Federal Bureau of Prisons Director Kathleen Hawk-Sawyer. The district court screened the complaint under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b)(1), and dismissed it for failure to state a claim. Mr. Hammer appeals, and, for the reasons explained below, we reverse and remand.

Mr. Hammer is incarcerated in the Federal Death Row Unit at the United States Penitentiary in Terre Haute, Indiana. In April 2001 Mr. Hammer filed this lawsuit, alleging that since March 2000 the defendants have unconstitutionally infringed on his right to freedom of speech by denying and restricting his access to the news media based on the content of his message and his status as a federal death-row inmate. In his complaint, Mr. Hammer alleged that between March 2000 and April 2001 a number of news organizations wished to conduct face-to-face or video-conference interviews with him, but that Warden Lappin denied every one of his requests to participate in the interviews. In addition, Mr. Hammer alleged that the Warden Lappin unconstitutionally restricted his ability to communicate with the media via telephone or mail correspondence.

According to Mr. Hammer, these restrictions limiting his access to the media are part of the defendants' deliberate plan to deny him a public forum and are in response to "public outcry" over a television interview conducted in March 2000 of federal death-row inmate Timothy McVeigh. Mr. Hammer further alleged that the reasons prison

officials provided for restricting his speech and denying his requests-namely, safety and privacy concerns-are not the real reasons they are restricting his speech. He contended that the prison's purported reasons are a "guise." He claimed that prison officials are restricting his speech because he is a death-row inmate and they want to prevent his views from being publicized. In particular, he alleged, they seek to suppress his views about capital punishment and his experience on federal death row. Mr. Hammer also alleged that before March 2000 he was allowed to participate in a number of interviews without causing any disruptions or prompting safety concerns.

In May 2001 the district court dismissed Mr. Hammer's complaint under § 1915A for failure to state a claim. The district court concluded that Mr. Hammer failed to state a claim because he had no constitutional right to face-to-face interviews, and because the restrictions on his access to the media served legitimate penological interests of safety, privacy, and order.

We review de novo a district court's dismissal under § 1915A for failure to state a claim. *Wynn v. Southward,* 251 F.3d 588, 591 (7th Cir. 2001). We apply the same standard as for dismissals under Rule 12(b)(6): we take all well-pleaded allegations in the complaint as true and draw reasonable inferences in the plaintiff's favor. *Id.* at 592; *Zimmerman v. Tribble,* 226 F.3d 568, 571 (7th Cir. 2000). A complaint fails to state a claim only if relief could not be granted under any set of facts consistent with the allegations. *Wynn,* 251 F.3d at 592.

Inmates retain First Amendment rights that are consistent with incarceration, and prison restrictions limiting or interfering with those rights must reasonably relate to legitimate penological interests. *Turner v. Safley,* 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); *Rowe v. Shake,* 196 F.3d 778, 782 (7th Cir. 1999). While inmates' free-speech rights include access to the media, inmates do not have a right to face-to-face interviews so long as other avenues of communication are open to them, and regulations denying face-to-face interviews are applied in a neutral, equal manner without regard to content . *See Pell v. Procunier,* 417 U.S. 817, 827-28, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974). Prison officials are given deference in establishing regulations and in determining appropriate restrictions, and we will not second-guess regulations or practices that serve legitimate penological interests. *Turner,* 482 U.S. at 89.

The Supreme Court has delineated four factors for determining whether a specific regulation or practice serves a legitimate penological interest. *Id.* at 89-90. The primary factor is whether a valid, rational connection exists between the restriction and a legitimate interest. *Id.* A restriction on speech that fails to meet this connection fails under *Turner. See Shaw v. Murphy,* 532 U.S. 223, 229-30, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). Relevant to this factor is whether the restriction on speech is applied in a neutral manner without regard to content and is applied equally among inmates. *Turner,* 482 U.S. at 90; *Rowe,* 196 F.3d at 782; *Abu-Jamal v. Price,* 154 F.3d 128, 134 (3d Cir. 1998). The other factors

relevant in determining a restriction's reasonableness include whether the inmate has alternative means of exercising the right; the impact accommodation of the asserted right would have on guards, other inmates, and prison resources; and the absence of a reasonable alternative to the regulation or practice. *Turner,* 482 U.S. at 90.

Given these standards, Mr. Hammer's complaint stated a claim. In regard to whether the restrictions on his speech have a valid, rational connection to a legitimate interest, Mr. Hammer specifically alleged that the defendants are restricting his speech based on his status as a death-row inmate and to suppress his views, and, despite their assertions to the contrary, not to serve legitimate interests. In addition, he alleged that the prison is not applying the restrictions in a neutral fashion, but is instead using the guise of unspecified security concerns to restrict his speech based on status and content. In regard to whether alternative avenues are open to him, Mr. Hammer alleged that the prison not only restricts his access to face-to-face interviews, but also unconstitutionally restricts his access via telephone and mail correspondence. He also alleged that the prison is already equipped for video-conferencing and that this would provide a readily available alternative to face-to-face interviews. In regard to the impact that accommodating his rights would have on the prison, Mr Hammer alleged that prior to March 2000 he participated in a number of interviews and that these interviews did not create any disruptions or security concerns. Finally, Mr. Hammer also alleged that the prison's practice of

ordering him, under threat of reprimand, not to mention any other inmate in any type of communication with the media does not conform to the Bureau of Prison's own regulations.[2] These allegations state a claim. *See Turner,* 482 U.S. at 89-90; *Abu-Jamal,* 154 F.3d at 134 (prison's restrictions directed at content of inmate's writings and in response to public pressure not valid under *Turner*); *see also Antonelli v. Sheahan,* 81 F.3d 1422, 1432 (7th Cir. 1996) (inmate's allegations stated a first amendment claim, and "[a]t this early stage in the litigation, we cannot determine, of course, whether the defendants may be able to justify" their conduct); *Shimer v. Washington,* 100 F.3d 506, 510 (7th Cir. 1996) ("The prison administration must proffer some evidence to support its restriction.").

Rather than taking the allegations in Mr. Hammer's complaint as true, the district court erroneously relied on materials outside the

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[2] On this point, Mr. Hammer alleged that the restrictions the prison placed on him were broader than those provided for in the regulations. Mr. Hammer alleged that in ordering him not to mention any other inmate in his communications with the media, Warden Lappin maintained that the restriction was warranted by Bureau of Prisons Regulation 28 C.F.R. § 540.61(d). The district court also relied on this regulation to conclude that the restrictions placed on Mr. Hammer's speech were warranted. On appeal, Mr. Hammer correctly points out that § 540.61(d) states that, "the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed;" whereas, he alleged that he was ordered not to mention any other inmate under any circumstances, regardless of whether or not the inmate refused to be interviewed.

complaint in order to conclude that it failed to state a claim. *See Covington v. Illinois Sec. Serv., Inc.*, 269 F.3d 863, 864-65 (7th Cir. 2001) (motion to dismiss under Rule 12(b)(6) erroneously granted by relying on attached EEOC letter rather than complaint); *Jacobs v. City of Chicago,* 215 F.3d 758, 766 (7th Cir. 2000). Mr. Hammer had attached several administrative-review documents to his complaint to show that he had exhausted his administrative remedies. 42 U.S.C. § 1997e(a); *Dixon v. Page,* 291 F.3d 485, 488 (7th Cir. 2002). The district court focused on two documents that were responses from Warden Lappin denying two of Mr. Hammer's requests for interviews on the basis of safety and privacy concerns. Instead of accepting Mr. Hammer's allegations that these explanations were a "guise" and not the reasons his speech is being restricted, the district court accepted Warden Lappin's explanations as true: "Warden Lappin's response shows that he considered the very unique environment of the death row unit ... It is clear that Lappin's decision and the supporting regulations are reasonably related to legitimate penological interests." At this early pleading stage, the district court erred by relying on those documents rather than on Mr. Hammer's complaint. *Covington,* 269 F.3d at 865; *Wynn,* 251 F.3d at 593-94; *Jacobs,* 215 F.3d at 766.

To be clear, we express no opinion about the merits of Mr. Hammer's claim, whether the prison's restrictions were justified, or the constitutionality of any regulations. But Mr. Hammer has properly

stated a claim and his complaint should not have been dismissed.

Accordingly, we REVERSE and REMAND to the district court for further proceedings.

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID PAUL HAMMER,

Plaintiff,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,

Defendants.

No. IP 01-0558-C-T/G.

ENTRY DISCUSSING COMPLAINT AND DIRECTING ENTRY OF JUDGMENT

I.

"A provision added to the Judicial Code by the Prison Litigation Reform Act of 1996 requires the district judge to screen prisoner complaints at the earliest opportunity and dismiss the complaint, in whole or part, if . . . it "fails to state a claim upon which relief can be granted."' *Sanders v. Sheahan*, 198 F.3d 626 (7th Cir. 1999) (quoting 28 U.S.C. § 1915A(b)(1)).

The screening process just described must be applied to the complaint of plaintiff David Paul Hammer, a prisoner at the United States Penitentiary at Terre Haute, Indiana, even though the filing fee prescribed by 28 U.S.C. § 1914(a) has been paid. *See Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (affirming that the district court is required to screen pris-

oner complaints at the earliest opportunity and dismiss the complaint, in whole or part, if it fails to state a claim upon which relief can be granted)(citing § 1915A(b)(1)).

II.

A.

Plaintiff David Paul Hammer is an inmate on death row at the United States Penitentiary in Terre Haute (USPTH). In his complaint, signed on April 14, 2001, and filed with the clerk on April 24, 2001, Hammer alleges that the defendants have violated his First Amendment rights. He seeks damages and injunctive relief. The defendants are (1) John Ashcroft, Attorney General of the United States, (1) Harley Lappin, Warden of the USPTH, and (3) Kathleen Hawk-Sawyer, Director of the Federal Bureau of Prisons (BOP). Each defendant is sued in both his or her official and individual capacities. He seeks compensatory and punitive damages and injunctive and declaratory relief. He invokes the theory set forth in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Hammer alleges that since March of 2000, the defendants have personally denied, or supported the policy of such denials, several media requests for face-to-face or videoconference interviews with Hammer. Hammer alleges that although the defendants have approved access to the media through telephonic interviews and correspondence, they have placed the condition on Hammer that he not provide information concerning any other inmate to any member of the media. The defendants have also re-

quired the media to sign an agreement that they will not ask Hammer any questions about any other inmate, will not print anything Hammer might say about any other inmate, and will not broadcast any recording made of any telephonic interview. An additional requirement, that media agree to submit a prepublication draft to the Warden to review for anything that might adversely affect the orderly or safe operation the prison, was eliminated some time prior to December 13, 2000.

B.

Hammer's complaint fails to state a claim upon which relief can be granted. It must therefore be dismissed, with this disposition being compelled by the following facts and circumstances:

1. To the extent Hammer complains of restrictions placed by the defendants on members of the media, he lacks standing to assert such claims. *See Johnson v. Stephan*, 6 F.3d 691, 692 (10th Cir. 1993)(prisoner has no standing to assert claims on behalf of the media).

2. It is true that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). Nonetheless, under the circumstances alleged, Hammer has no constitutional right to give face-to-face interviews with the media. "Denying media access to conduct face-to-face interviews with inmates is constitutional as long as alternative means for communicating with the media are available." *Johnson v. Stephan*, 6 F.3d at 692

(citing *Pell Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974)). Here, Hammer was and is permitted to communicate with the media through telephonic interviews and the mail. Therefore, no violation of his First Amendment rights occurred through the denial of face-to-face or videoconference interviews.

3. Hammer alleges that the restriction placed on him that he not provide any information to the media regarding other inmates violates his First Amendment rights, and that no BOP policy or regulation allows such a restriction. He is mistaken here as to both the facts and the law.

a. On May 1, 2000, Warden Lappin responded to Hammer's request for Administrative Remedy for the denial of two media representatives who intended to interview Hammer about the Oklahoma City bombing, another inmate, Hammer's status as a death row inmate, conditions in death row, and Federal executions, in part, as follows:

> Program Statement 1480.04, *News Media Contacts*, provides guidance for determining the appropriateness of approving news media interviews for inmates. The regulation and policy was promulgated with a provision which recognizes that it is not the Bureau's intent to provide publicity for the inmate via the news media. In addition, the Bureau recognizes that it has the responsibility

to protect the privacy and other rights of inmates and staff. Finally, interviews must be regulated to insure the safe and orderly operation of the institution.

Program Statement 1480.04, *News Media Contacts*, also specifically states, "A representative of the news media shall collect information only from the primary source. A representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed."

All requests for interviews are evaluated based upon this policy along with any information available to me with regard to the request.

b. Warden Lappin wrote the following explanation as part of his denial of a face-to-face interview on December 13, 2000:

As you are well aware, the Special Confinement Unit is unique in that it is the only unit in the Federal Bureau of Prisons designed to hold inmates sentenced to death by the federal judicial system. Accordingly, the procedures that govern the operation of the unit are also unique but in accordance with applicable

law and policy. Given the nature of the unit and the potential for disruption that would likely result from one inmate giving information about another inmate without their consent, the requirement that recordings of interviews not be broadcast was imposed. Additionally, requests for in-person media interviews are evaluated on a case by case basis. Though recent requests for in-person interviews have only been approved for telephone interviews, this does not preclude the possibility that future in-person interview requests may be granted. All future requests will also be evaluated in light of the responsibility of the Bureau of Prisons to operate safe and secure institutions that protect the safety and privacy of staff and inmates.

c. Contrary to Hammer's assertion that no BOP policy or regulation permits the Warden to condition any interview on Hammer not providing any information about other inmates, federal regulations specifically authorize such constraints. *See* 28 C.F.R. § 540.60 through § 540.65 ("Contact with News Media").[1]

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[1] 28 C.F.R. § 540.60 (Purpose and Scope) provides, in part, that

d. The Supreme Court has recognized that "the core functions of prison administration [are] maintaining safety and internal security." *Turner v. Safley*, 482 U.S. 78, 92 (1987). It follows that Hammer's claim must be considered in light of the special environment of a prison, where administrators "must be accorded wide-ranging deference in the . . . execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier*, 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted).

e. Even if Warden Lappin's restriction and the regulations upon which that determination was based, infringe on a First Amendment right, the restriction may be upheld. In evaluating prison regulations that allegedly infringe on inmates' constitutional rights,

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[i]t is not the intent of this rule to provide publicity for an inmate or special privileges for the news media, but rather to insure a better informed public. The Bureau of Prisons also has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, an interview in an institution must be regulated to insure the orderly and safe operation of the institution.

28 C.F.R. § 540.61(d) (Authorization) provides that

[a] representative of the news media shall collect information only from the primary source. A representative of the news media may not obtain and use personal information from one inmate about another inmate who refuses to be interviewed.

the Supreme Court has set forth this test: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 483 U.S. at 89. The Court explained its adoption of this standard as "necessary if 'prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.'" *Id.* (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977).

f. Here, in prohibiting Hammer from providing information about other inmates, including but not limited to Timothy McVeigh, Warden Lappin's response shows that he considered the very unique environment of the death row unit at USPTH, the privacy concerns of all inmates and staff, and the potential for disruption of the safe and orderly operation of the prison. It is clear that Lappin's decision and the supporting regulations are reasonably related to legitimate penological interests, and they must be upheld.

III.

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85. This responsibility is further complicated when certain functions, such as maintaining the custody of

prisoners on death row, are to be carried out. The proper inquiry in this case is whether the challenged regulation is "reasonably related to legitimate penological interests," *id. at* 89, and on the basis of the complaint the court concludes that the challenged regulations and the Warden's implementation of them meet that standard. No other conclusion is warranted—nor indeed would another conclusion be possible—in the circumstances here.

Based on Hammer's allegations and on the law discussed in Part II of this Entry, Hammer's complaint fails to state a claim upon which relief can be granted. Accordingly, the action shall be dismissed with prejudice. Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

/s/ John D. Tinder, Judge
John D. Tinder, Judge
United States District Court

Date: May 24, 2001

Appendix F

Constitutional Provisions and Regulations Involved

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 C.F.R. § 540.63

§ 540.63 Personal interviews.

(a) An inmate may not receive compensation or anything of value for interviews with the news media.

(b) Either an inmate or a representative of the news media may initiate a request for a personal interview at an institution.

(c) Visits by the news media to conduct personal interviews are subject to the same conditions stated in § 540.62. A media representative shall make a request for personal interview within a reasonable time prior to the personal interview.

(d) Staff shall notify an inmate of each interview request, and shall, as a prerequisite, obtain from the inmate written consent for the interview prior to the interview taking place. The written consent or denial becomes part of the inmate's central file.

(e) As a prerequisite to granting the interview, an inmate must authorize the institutional staff to respond to comments made in the interview and to release information to the news media relative to the inmate's comments.

(f) The Warden shall normally approve or disapprove an interview request within 24 to 48 hours of the request.

(g) The Warden shall document any disapproval. A request for interview may be denied for any of the following reasons.

(1) The news media representative, or the news organization which he or she represents, does not agree to the conditions established by this subpart or has, in the past, failed to abide by the required conditions.

(2) The inmate is physically or mentally unable to participate. This must be supported by a medical officer's statement (a psychologist may be used to verify mental incapacity) to be placed in the inmate's record, substantiating the reason for disapproval.

(3) The inmate is a juvenile (under age 18) and written consent has not been obtained from the inmate's parent or guardian. If the juvenile inmate's parents or guardians are not known or their addresses are not known, the Warden of the institution shall notify the representative of the news media of the inmate's status as a juvenile, and shall then consider the request.

(4) The interview, in the opinion of the Warden, would endanger the health or safety of the interviewer, or would probably cause serious unrest or disturb the good order of the institution.

(5) The inmate is involved in a pending court action and the court having jurisdiction has issued an order forbidding such interviews.

(6) In the case of unconvicted persons (including competency commitments under 18 U.S.C. 4244 and 4246) held in federal institutions, interviews are not authorized until there is clearance with the court having jurisdiction, ordinarily through the U.S. Attorney's Office.

(7) The inmate is a "protection" case and revelation of his or her whereabouts would endanger the inmate's safety.

(h) Interviews are normally held in the institution visiting room during normal weekday business hours. The Warden may:

(1) Determine that another location is more suitable for conducting the interview;

(2) Limit interview time for the entire institution if the Warden determines that the interviews are imposing a serious drain on staff or use of the facilities;

(3) Limit to one one-hour interview per month for an inmate in segregation, restricted, holdover, control unit, or hospital status if required by special security, custodial, or supervisory needs; and

(4) Limit the amount of audio, video, and film equipment or number of media personnel entering the institution if the Warden determines that the requested equipment or personnel would create a disruption within the institution.

(i) In conjunction with the personal interview, if the member of the media wishes to tour the institution, he or she must comply with the provisions of § 540.61.

(j) Interviews are not subject to auditory supervision.

Appendix G

From: Fontenot, Jessica - DC
To: cosbyri
CC: fontenot
Sent: 4/12/01 11:33:01
Subject: Ashcroft's words on McVeigh execution

BC-JUSTICE-ASHCROFT-MCVE 04-12 0426 BC-JUSTICE-ASHCROFT-MCVEIGH SKED JUSTICE-ASHCROFT-MCVEIGH sked The Federal Document Clearing House
TRANSCRIPT
April 12, 2001
NEWS CONFERENCE
JOHN ASHCROFT
U.S. ATTORNEY GENERAL
JOHN ASHCROFT HOLDS NEWS CONFERENCE REGARDING THE MCVEIGH
EXECUTION eMediaMillWorks, Inc. (f/k/a Federal Document Clearing House, Inc.)
209 PENNSYLVANIA AVENUE, S.E., 2nd Floor
WASHINGTON, D.C. 20003
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EVENTDATE: 04-12
ATTORNEY GENERAL ASHCROFT HOLDS JUSTICE DEPARTMENT NEWS CONFERENCE REGARDING THE MCVEIGH EXECUTION

APRIL 12, 2001
SPEAKERS: JOHN ASHCROFT, U.S. ATTORNEY GENERAL
(+)

ASHCROFT: Good Morning.

In 1988, the federal death penalty was reinstated by the United States Congress and the president with the enactment of the Anti-drug Abuse Act. In 1994, Congress and the president expanded the capital sentencing available under the federal law in the Federal Death Penalty Act.

Under these two legislative acts, the federal statutes allow the death penalty for some of the most heinous and violent crimes imaginable. These include the intentional killing, espionage and treason, a kidnapping or conspiracy that results in a murder, killing a law enforcement officer, or committing a major drug trafficking crime.

Under both laws, before the death penalty can be imposed, a special hearing is required to determine whether a sentence of death is justified. A jury following a death-eligible conviction must determine whether a sentence of death is justified based on evidence and arguments presented by each side and instructions from the court.

On June 2, 1997, a jury convicted Mr. Timothy McVeigh of the April 19, 1995, bombing of the Alfred P. Murrah building in Oklahoma City. This brutal act of terrorism killed 168 innocent people, including 19 children, and injured hundreds more. Its savagery stole parents from 219 children and made

30 children orphans in a single act. This cowardly crime against our nation was the largest terrorist attack ever within the United States of America.

ASHCROFT: On June 13, 1997, the jury that heard the case of the Oklahoma City bombing made a recommendation of death for Mr. McVeigh, and the sentence was imposed by a federal judge on August 14, 1997.

Mr. McVeigh's conviction was confirmed on direct appeal, and his post-conviction challenges have been rejected by the courts. Mr. McVeigh has exhausted his right to any further appeals, and he is scheduled to be executed on May 16, 2001.

The last death penalty imposed by the federal courts under the federal law occurred in 1963. The policies the Justice Department outlines today will provide the basis for handling future executions ordered by federal courts. These policies will be written into the appropriate documents and made available to the public, including the final execution protocol.

The Bureau of Prisons has been preparing to fulfill its responsibilities under the law for years now, and we have consulted closely and thoroughly with them in establishing these policies.

As you know, I also met with about 100 survivors and victim family members on Tuesday to hear their stories and try to understand their loss.

ASHCROFT: The magnitude of this case is certainly stunning. My time with these brave survivors changed me. What was taken from them

can never be replaced nor fully restored. Their lives were shattered. And I hope that we can help to meet their need to close this chapter in their lives.

I also hope that their experience in Oklahoma City is unique in our American experience. Obviously, this case has many unique elements, and it is a unique set of circumstances that confront us. The Oklahoma City survivors may be the largest group of crime victims in our history, so the Department of Justice must make special provisions to assist the needs of the survivors and victims' families in accordance with our responsibilities to carry out justice.

Current Bureau of Prisons regulations allow for eight witnesses. This is plainly inadequate. As attorney general, I authorize the following measures for victims of this crime.

First, we have decided to allow two additional citizen witnesses to be present at the execution in Terre Haute. This will bring the total number of citizen witnesses to 10 and will equal the number of media witnesses. These witnesses will be selected by lottery, as was done for the trial.

ASHCROFT: Second, under these special circumstances, we will arrange for a closed-circuit transmission of these events to Oklahoma City, just as was done during the trial pursuant to the congressional authorization.

The closed-circuit transmission will take place at a facility in Oklahoma City that is yet to be determine. The Bureau of Prisons will work with the FBI's Crisis Response Unit to provide a highly reliable and

secure closed-circuit audio and video transmission from the United States penitentiary in Terre Haute to the designated site in Oklahoma City.

The broadcast will use the latest encryption technology integrated with state-of-the-art video-conferencing over high-speed digital telephone lines. Federal regulations prohibit any recording of the execution. Therefore, any closed-circuit transmission will be instantaneous and contemporaneous.

Because of our concerns about attempts to steal or disrupt the transmission signal, we will not be able to provide any further details about the transmission process.

The transmission to the victims in the Oklahoma City area will begin at the same time the curtain is opened for viewing by victim witnesses in the execution facility.

ASHCROFT: All witnesses will see Mr. McVeigh on the execution table, and they will be able to hear any final statement Mr. McVeigh makes.

Third, at the request of the victims I met with on Tuesday, we will show those who are watching from Oklahoma City a video with footage of the site in Terre Haute, including the execution room. In addition, we will have representatives of the Bureau of Prisons on site to help prepare these witnesses for what they will see on the closed-circuit transmission.

Finally, I realize after visiting with survivors and victim's families that there are some people who in the event that they are not one of the 10 citizen witnesses still want to be present in Terre Haute,

even if they cannot view the execution via closed-circuit television. For those victims, we will provide an area in Terre Haute near the prison facility.

To those of you here, I am aware that several media outlets have requested access to interview inmate McVeigh. As an American who cares about our culture, I want to restrict a mass murderer's access to the public podium. On an issue of particular importance to me as attorney general of the United States, I do not want anyone to be able to purchase access to the podium of America with the blood of 168 innocent victims. Media access to special confinement unit inmates will be limited to each inmate's ordinary allotment of telephone time.

ASHCROFT: Inmates in the special confinement unit in Terre Haute are allowed a 15-minute personal telephone call each day. Inmates can use those calls in any way they choose, including interviews with the media. Requests for interviews may be made to the warden. Should an inmate agree to an interview, the warden with coordinate the setting up of the interview.

If the news media conducts an interview with Timothy McVeigh, I would ask them for self-restraint. Please do not help him inject more poison into our culture. He's caused enough senseless damage already.

We are already being sued to provide more publicity for this execution. I would ask that the news media not become Timothy McVeigh's co-conspirator in his assault on America's public safety and a upon America itself.

Finally, unless a court intervenes, the execution is expected to proceed as scheduled at 7 a.m. on May 16, 2001.

ASHCROFT: I would now like to introduce Kathleen Hawk Sawyer, director of the Federal Bureau of Prisons. The Bureau of prisons has done a great deal of work in preparation for this execution, and I want to commend the director and her staff for a job well-done.

Ms. Hawk Sawyer?

KATHLEEN HAWK SAWYER, DIRECTOR, FEDERAL BUREAU OF PRISONS: I will provide some information on the sequence of events leading up to the execution.

On April 6, 2001, inmate McVeigh was briefed by the warden on aspects of the execution process, including the inmate witnesses, disposition of both his personal property and his body, and his last meal.

Beginning seven days prior to the execution day, McVeigh will have access to only his spiritual advisers, his defense attorneys, and members of his family, and employees of the Bureau of Prisons.

Approximately 24 to 72 hours before the execution, he will be moved to the execution facility holding cell. Twenty-four hours before the execution, his telephone calls will be restricted to those approved by the warden or calls to his attorneys. McVeigh's attorneys, spiritual advisers and immediate family members will be provided noncontact visiting privileges up to two hours before

the execution. McVeigh will be allowed to receive mail and reading material. He will be under constant staff supervision.

Two hours prior to the execution, all visitors and attorneys will leave the execution facility. At this time, the institution will establish an open telephone line with the Department of Justice command center.

Approximately one hour prior to the execution, McVeigh will be searched by the escort team, secured with restraints, removed from the holding cell, and escorted to the execution room by our escort team, and the staff participating in this execution process will be on a voluntary basis only.

HAWK SAWYER: Once in the execution room, the ambulatory restraints will be removed. He will then be restrained to the table, and the IVs will be inserted.

The government witnesses will already be in the government witness room. At this time, the remaining three groups of witnesses will be admitted to the facility in separate rooms.

McVeigh will be able to selected six witnesses, to include a spiritual adviser, two attorneys and three family members or friends.

The media will be represented by 10 witnesses.

The regulations allow for up to eight victim witnesses in the execution facility, but due to the extraordinary number of victims in this case, as the attorney general noted, the number of victim witnesses has been expanded to 10, the maximum

number that the victim witness room will accommodate.

The drapes will be opened and the warden will provide McVeigh with an opportunity to make a short final statement. The warden will read relevant portions of the judgment and commitment order and then ask the marshal if the execution can proceed. The marshal will then check with the Department of Justice command center, and absent a stay entered by the court, the execution will occur as scheduled.

Provided there are no legal impediments to proceeding, the marshal will inform the warden to proceed. At this point, the lethal chemicals will be administered. The warden will announce the time of death and inform the witnesses that the execution has concluded. The drapes will then be closed and the witnesses will be escorted out of the facility. The coroner will then sign the death certificate. The United States marshal will complete and sign the return.

Immediately following notification of death, staff will make an announcement from the press briefing area and a post-execution press briefing will be conducted shortly thereafter.

HAWK SAWYER: I would also like to make a brief comment about arrangements for demonstrators. The institution has developed procedures to allow demonstrators to exercise their First Amendment rights. Demonstrators will be permitted to begin demonstrating shortly after midnight on May 16, 2001. At 12:01 a.m., buses will begin transporting demonstrators from designated locations to areas on

the grounds of the United States Penitentiary Terre Haute.

Separate areas on institution grounds will be provided for those who support and for those who oppose the death penalty. Demonstrators will be limited as to what they can bring to the demonstration area. Demonstrators 17 years of age or under must be accompanied by an adult.

Following the execution, the buses will begin transporting participants back to the appropriate parking areas.

Thank you.

QUESTION: Attorney General, as I understand it, the public witnesses and the witnesses in Oklahoma will be able to hear Timothy McVeigh's last statement. Is there any concern that he may use that last statement to taunt the survivors and the relatives of those killed?

ASHCROFT: Mr. McVeigh's expressions have frequently been offensive, and I think it's understood that they have been of notable offense to the survivors. Among the offenses to the survivors that have already been cited is his reference to the children who were killed as, quote, "collateral damage." Obviously, we have no way of anticipating what his last words will be.

QUESTION: You had asked for the media to exercise self-restraint. Are you suggesting that in your view that there not be interviews with McVeigh, that they not be requested? What is your view on that?

ASHCROFT: We have provided a basis for the inmate to express himself up to 15 minutes a day, and made provision that the media be, with his permission, allowed to speak with him during that interval. I would just hope that, in its exercise of its responsibilities, that the media would be responsible. I am not trying to define for the media what their responsible position would be.

QUESTION: Does asking for an interview or conducting an interview constitute giving him a platform, in your view?

ASHCROFT: Obviously, if no one were to call him and interview him, he would have less platform than he would otherwise have.

Yes, sir?

QUESTION: Let me ask you about the precedent for two of these decisions, both on closed circuit and on media interviews. Are you saying here that in the future federal executions can be televised by a closed circuit? Or is this just specific to McVeigh?

And, also, interviews, can other federal inmates on federal death row be interviewed or is that policy specific to McVeigh as well?

ASHCROFT: By and large, the procedures that have been outlined here are procedures which we think will shape and inform the policies of the Bureau of Prisons and the Department of Justice in future settings.

ASHCROFT: There are unique circumstances here that have been recognized by the Congress, in terms of the scale of those whose lives have been affected.

For instance, the trial was the subject of congressional specific funding and authority for closed-circuit television. So I would say that while there are precedential procedures here, there are obviously unique circumstances that are reflected in the way that this entire circumstance has been approached.

QUESTION: Attorney General, do we understand you to say that there will be no television interviews allowed at the facility?

ASHCROFT: The access that Mr. McVeigh has for communication will be limited to the access provided to inmates in this special unit, and it is a 15-minute per day telephone opportunity for any inmate in that setting to contact and express himself to others.

I should clarify that just a little bit. A spiritual adviser of an inmate has an opportunity to go to the unit and to confer with them. The legal advisers to the inmates are not governed by the 15-minute limitation.

And you would clarify that for me, if it needs clarification.

QUESTION: Governor...

ASHCROFT: Call me what you want to call me. I've been there.

QUESTION: General, the governor of Oklahoma and others, the senators and the folks down there said, all of Oklahoma has been a victim of this crime. Have you considered at all some way to let all the Oklahoma victims who are not registered witness this execution?

ASHCROFT: There is a sense in which every American is a victim of this crime. It's clear that this was an assault on America, and it was, in my judgment, a cowardly assault that tragically disrupted the lives of people in a devastating way in Oklahoma.

One of the reasons that we have media and press witnesses in these events is to provide a basis for the culture's understanding of the event with a view toward understanding that we are all victims.

Let me just say that when I indicate that we are all victims, I in no measure want to suggest that we are victims as the families were in Oklahoma. Having spoken with children who lost fathers, with mothers who lost daughters, with grandmothers who lost daughters and grandchildren in the same calamity, their loss is most tragic and virtually unspeakable.

QUESTION: Mr. Ashcroft, you've been outspoken in your comments on school shootings and violence, that there's a danger of encouraging copycat crimes by the sensationalizing of these catastrophic events through extensive media coverage. Has the thought occurred to you that your decision today might encourage that also?

ASHCROFT: I am concerned about what I think I referred to as a culture of violence. I'm concerned about irresponsible glamorization of a culture of violence, and that concern has shaped our approach to these issues profoundly. We think it would be a tragedy compounded if, in some way, the decision of

the United States to require the ultimate penalty here were to provide a basis for Timothy McVeigh to extend his assault and further extend his disruptive conduct on America. With that in mind, we have sought to undertake this in the way that is likely to minimize those concerns.

QUESTION: Mr. Ashcroft, you said that Timothy McVeigh had exhausted his appeals. But if his legal advisers and he should change their minds and decide to pursue some other legal avenue, do we understand that they may do so, and he could be removed from the holding cell and the whole issue delayed up to two hours before the execution?

ASHCROFT: Mr. McVeigh has exhausted his appeals. And the execution will proceed as scheduled, unless a court intervenes to set it aside.

QUESTION: That would be at this request, I would assume?

ASHCROFT: I don't think I would envisage anything else, but if a court does not intervene to set it aside, this execution will proceed.

QUESTION: Would the telephone calls, if he chooses to do media interviews by the telephone, would recordings of those phone calls be allowed to be broadcast?

ASHCROFT: No. They're not to be recorded calls.

QUESTION: How will the 10 citizen witnesses be selected?

ASHCROFT: The citizen witnesses are to be selected by lottery, and the lottery conducted in the

same way that the lottery was conducted to provide access to the trial. And so it will be a lottery system which provides access for those citizen-victim witnesses.

QUESTION: You said your meeting with the survivors has changed you. How has it changed you?

ASHCROFT: I had an intellectual understanding of what happened at Oklahoma City. But visiting the memorial and visiting with the witnesses gave me an emotional understanding.

If you've had the privilege of being to the memorial in Oklahoma City – and frankly, I think it's an exercise in understanding freedom and the threats to freedom that is a therapy and is a valuable one.

The first room they took me into was a room which re-created a meeting that was under way and they literally had the tape recording of I believe what was the Oklahoma Water Resources Board meeting. And you listen to the tape of the woman who was reading into the record the parties for the meeting, the concerns to be dealt with at the meeting and, all of a sudden, you literally here on an actual – not a re-creation, but an actual tape recording – the concussive and the chaos and the falling debris.

I did this standing next to two individuals. One individual whose daughter and unborn grandchild had been killed in the debris, and the other individual was a woman who had been in the building at the time of the blast.

Very frankly, that was just a profound signal to me that this was not a set of statistics. Sometimes the numerics of massive tragedies tend to get lost in the statistics.

ASHCROFT: And 168 is such a big number that it's hard to process just because of the numerics and the hundreds of additional individuals who were bloodied and battered and crushed, and there were amputations in the building on the spot with inadequate and nonclinical facilities just to get people out from under the rubble.

It became a reality to me in an emotional way that sort of displaced in many respects the intellectual understanding.

And let me just go one step further. In talking to these victims – and this is not all the victims, there may be other victims that had different experiences – a number of victims, because of the nature of this calamity, were advised by authorities not to view the remains of their deceased relatives. Some of the deceased relatives, frankly, were not extricated from the rubble for as long as three or four weeks.

And for those individuals, they had stories to tell. They recounted personal circumstances of the absence of closure. They didn't have the ability to say: I came to grips with this, because I never saw it. It's as if my family left one day, and they never came back. We never saw their remains or their bodies.

ASHCROFT: And for these individuals, it is important in a unique way that they see at least – and I think they believe that, and I believe they are

right – that they have a capacity to witness this event.

And so, it's with that in mind that, frankly, my intention to accommodate with closed-circuit, secure transmission of these events was galvanized, and this is something that justice requires, and it's an appropriate responsibility for the Justice Department to carry out.

QUESTION: How many people will be allowed to view via closed circuit? It is going to be just limited to the 250 or so who've previously signed up? Is there an additional number that will be allowed?

ASHCROFT: This will be dealt with at the local level by the same officials who orchestrated and otherwise dealt with the trial. The exact numbers may depend on the expressions of interest. But by and large, an inventory has been made of individuals who have expressed an interest, and I believe we'll be able to accommodate them.

QUESTION: You said that media interviews with McVeigh can't be recorded. Or just maybe a question for the prison director, is that normally Bureau of Prison policy? And how do you enforce it, since anybody can presumably tape a telephone...

ASHCROFT: I thought he addressed it to you.

HAWK SAWYER: OK. Our current policy is a broad policy that provides the parameters for all of the Bureau of Prisons institutions.

HAWK SAWYER: Each institution is able to develop local policy, institution supplements, that define the unique nature of any particular missions

within their institution. So this policy will apply to the special confinement unit where inmates are held.

And when you asked the question of "Can we really ensure that that's followed?" we will make that arrangement and that understanding with members of the media who seek to have a media interview. And then it will be simply up to the integrity and honor of the media representative to follow that.

QUESTION: Is it specific to this execution? Or is that going to be the protocol for all future federal executions?

HAWK SAWYER: It will become the policy for the special confinement unit in general.

ASHCROFT: I thank you all very much. Thank you.

Appendix H

U.S. Department of Justice
Federal Bureau of Prisons
U.S. Penitentiary
Terre Haute, IN 47808

Number: THA-1480.05A
Date: April 16, 2001
Subject: News Media Contacts

Institution Supplement

1. PURPOSE: To provide guidelines for implementing the Bureau of Prisons Program Statement on this subject. This Institution supplement must be read in conjunction with the Bureau of Prisons' Program Statement.

2. DIRECTIVES AFFECTED: Bureau of Prisons Program Statements 1480.05, News Media Contacts, dated 09/21/00; and 5840.04, Staff Correspondence About Inmates, dated 09/01/00; are referenced. Institution Supplement 1480.3C, Contact with News Media, dated 02/08/99, is hereby superseded.

3. CORRECTIONAL STANDARDS REFERENCED: 3-4021-1.

4. PROCEDURES: The Executive Assistant is delegated the responsibility for implementing this program and for its continued operations, and shall notify the Warden of any unusual circumstances, events or incidents which might prove newsworthy.

   A. Inmate/Media:

      (1) An inmate may initiate an interview with the news media by regular

correspondence or through inmate correspondence procedures. Representatives of the news media or other publications may initiate an interview with a particular inmate through correspondence.

(2) When an interview request is received, the request will be submitted to the inmate the media representative has requested to interview. The inmate will accept or decline the request in writing via the BP-S233.014 form, News Interview Authorization.

(3) The interview request will then be directed to the Chief Executive Officer. Once reviewed and approved, the request will be routed to the Public Information Officer (PIO) or the Executive Assistant, who shall be responsible for coordinating, monitoring, and supervising the interview. It shall be the responsibility of the PIO to ensure that all necessary forms are completed as indicated below:

(a) Prior to the Interview, the news media representative shall complete the BP-S232.014, Media Representative Agreement Form. The news media representative also should review Program Statement 1480.05, News Media Contacts prior to the interview. The original of each of the above-mentioned forms will be

placed in the concerned inmate's Central File, and a copy will be provided to the media representative.

(b) Interviews will not be subject to auditory monitoring. Interviews will be conducted only Monday through Friday, excluding holidays. Camp interviews will be arranged individually after consultation with the Camp Administrator. Any exception to the above must be approved by the PIO after consultation with the Chief Executive Officer.

(c) Photographs, audio, and/or video recordings may be made with the prior approval of the Chief Executive Officer, and the signing of the appropriate consent forms by the inmate. So as not to disrupt other visitors, video recording may be limited to periods during which no other visitors are utilizing the Visiting Room (7:30 AM to 8:00 AM), or at such other times as determined by the PIO with the approval of the Chief Executive Officer.

B. Special Confinement Unit (SCU)

(1) To maintain safety, security and the good order of the SCU, in-person interviews (including video-recorded interviews) will not be permitted.

(2) SCU inmates normally have access to the media through the General and Special Mail Procedures, as well as monitored and unmonitored telephone calls. The policies on correspondence and telephone regulations apply, except as modified for SCU inmates.

(3) **Monitored Media Telephone Calls** - SCU inmates requesting media representatives be placed on their approved social telephone list for monitored, unscheduled calls must have the media representative complete the Conditions for Media Telephone Contact form (Attachment A). The media representative must submit the completed form to the Executive Assistant or PIO before being placed on the telephone list. Monitored telephone calls to media representatives count against the SCU inmate's allotted time for social calls, and are subject to the 15-minute duration limit.

(4) **Unmonitored Media Telephone Interviews** - Requests for unmonitored media telephone interviews must be approved by the Warden and coordinated through the Executive Assistant or PIO according to the following procedures:

(a) If a media representative requests a telephone interview, the SCU inmate will accept or decline the request on

Form BP-S233.014, News Interview Authorization. If the SCU inmate accepts, the media representative must complete the Conditions for Media Telephone Contact form (Attachment A) and return it to the Executive Assistant or PIO. Media interviews will be unmonitored.

(b) SCU inmate requests for unmonitored telephone interviews should be submitted on a Form BP-148.070, Inmate Request to Staff Member. The SCU inmate will also forward the media representative a copy of the Conditions for Media Telephone Contact form (Attachment A). The media representative must complete the form and return it to the Executive Assistant or PIO.

(c) Unmonitored telephone interviews with media representatives count against the SCU inmate's allotted time for social calls, and are subject to the 15-minute duration limit.

(5) Media interviews and telephone calls to media representatives within seven days of that SCU inmate's execution date are prohibited.

C. Staff/Media:

(1) The Warden and the designated PIO or (Executive Assistant) are the only staff authorized to make statements to the

news media regarding institutional matters. In potentially newsworthy situations, the Institution Duty Officer shall notify the PIO and the Administrative Duty Officer of factual events which have occurred. Upon consultation with, and the approval of the Chief Executive Officer, the PIO will prepare and disseminate a press release, if appropriate. All press releases must be approved by the Chief Executive Officer.

(2) If a media inquiry is received after normal duty hours, the following information will be noted: the inmate's name, the caller's name, telephone number, organization represented, and the nature of the request by the caller. This information will be communicated to the Operations Lieutenant who shall notify the PIO, or if the PIO cannot be reached, the Institution Duty Officer. In accordance with the Bureau of Prisons' Program Statement 1480.05, News Media Contacts, Page 5, CN-1, the Institution Duty Officer is authorized to release only basic public information, i.e., inmate name, number, location (if not a WITSEC inmate), offense, length of sentence, etc. Any other information will be released only by the PIO, Warden, or Acting Warden. It shall be the responsibility of the Institution Duty Officer to ensure that on the next

regularly scheduled workday, the PIO is made aware of any after hours contacts by the news media.

5. RESPONSIBILITY: The Executive Assistant is responsible for the contents and the annual review of this Institution Supplement. Any requests for procedures other than those described in this supplement must be authorized in writing by the Chief Executive Officer.

/s/ Harley G. Lappin
Harley G. Lappin, Warden

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THA-1480.50A
Attachment A

Conditions for Media Telephone Contact with Inmates in The Special Confinement Unit (SCU), USP Terre Haute

The Special Confinement Unit (SCU) of the United States Penitentiary, Terre Haute, Indiana, is a maximum security federal prison facility housing many physically violent, predatory, and escape prone inmates. In order to maintain the safety, security and good order of the SCU, the Warden may regulate your telephone contact with SCU inmates.

By signing this form, you acknowledge and agree to the following conditions regarding your telephone contact with the following SCU inmate:

_____, _____,
(Inmate Name) (Reg. No.)

If evidence indicates you violated this agreement, or any of the rules or regulations of the USP Terre Haute, your ability to contact inmates in Bureau custody by telephone may be restricted.

1. **TELEPHONE CONVERSATIONS WITH AN SCU INMATE MAY NOT BE RECORDED OR BROADCAST.**

2. You are prohibited from asking or discussing with the above-named SCU inmate any information regarding other federal or state inmates. If the above-named SCU inmate provides you with any information regarding other federal or state inmates, you are prohibited from publishing such information. Comments

made by one inmate concerning another could violate the privacy interests of the other inmate, and might cause a reaction that could threaten the safety, security, or good order of the institution.

3. You are prohibited from publishing information about operational procedures or security features of the institution, insofar as it may threaten the safety, security, or good order of the institution.

4. If the above-named SCU inmate makes allegations regarding a staff member, the institution, or the Bureau of Prisons, you must exercise your professional responsibility to make reasonable attempts to verify these allegations, and afford the institution the opportunity to comment.

_____ _____

Signed Name Date Signed

_____

News Organization